Central Law Journal.

ST. LOUIS, MO., AUGUST 30, 1895.

It should be a matter of congratulation among members of the bar in all the States, that the reform in the direction of what is known as Uniform State Legislation has now reached a point where definite and substantial results may be predicted. At least this assurance is given us by Frederic Jesup Stimson in an interesting paper, read before the American Academy of Political and Social Science. After a good many years' agitation on the subject, a conference in which seven States were represented, was held in New York in 1892. At a meeting in the following year at Milwaukee twenty States sent commissioners. At a later meeting in Saratoga twenty-two States appeared, and Mr. Stimson expresses the belief that to the meeting to be held the present month at Saratoga at least thirty States will send delegates. This attempt at national unification of law is entirely based on the voluntary action of the States, which have appointed more or less permanent boards of commissioners for this purpose, who meet from time to time in national conference. This national conference then recommends forms of uniform statutes, which each State commission, returning, presents to the governor or the legislature of its own State for enactment. The method is a simple one, but the movement, if successful in any degree, would, as Mr. Stimson says, "be the most important juristic work undertaken in the United States since the adoption of the federal constitution. In the more than one hundred years that have elapsed since that time there has been no official effort to obtain greater harmony of law among the States of the Union; and it is the first time since the debates on the constitution that accredited representatives of the several States have met together to discuss any legal question from a national point of view." The first conference wisely decided to take up the most simple matters first, that is, matters chiefly of form, and to proceed later to matters of substance. A uniform law for the acknowledgment and execution of deeds was first recommended and approved, which has since received the endorsement of all the States in the conference, has actually been adopted in Massachusetts and is the law in many other States. A uniform law relative to sealing and attestation of deeds has also been adopted. On the subject of the execution of wills, which early engaged the attention of the commission, "most of the States," says Mr. Stimson "have in fact adopted the simple statute which the commission recommended, which makes a last will and testament executed outside of any State in the mode prescribed by law, either of the State where it is executed or the State where the testator lives, equally valid in both States; and as to the probate of wills a similar statute was recommended, that any will duly proved without any State but in the State where the testator lives, may be duly admitted to probate in such other State by filing an exemplified copy. Both these statutes are the law already of the bulk of the States, and are very good examples of a case where unanimity of law throughout the entire country may, we hope, be obtained with very little friction." In the domain of commercial law, the only subject which the conference has thus far taken up is that of days of grace and the presentment of bills and notes. They have recommended the abolition of all days of grace; but this statute, though duly enacted in New York, failed of enactment in Massachusetts, owing largely to the prejudice of the country people. It is perfectly obvious that nothing has been gained to the borrower by making a note that is due in sixty days run for sixty-three, for he has to pay the additional interest on the three days. The only practical consequence is to complicate bank accounts, and to bring on much uncertainty and even considerable danger as to the duty of banks in forwarding bills and notes which are payable in some other State. But the whole subject of commercial law is one in which there may be much difference of opinion as to the wisdom of attempting a universal codification. The question of marriage and divorce has engaged the serious attention of the conference but so far without practical result, except the adoption of a resolution to the effect that no judgment or decree or divorce should be granted unless the defendant be domiciled within the State in which the action is brought, or shall have

been domiciled therein at the time the cause of action arose, or unless the defendant shall have been personally served with process within said State, or should have voluntarily appeared in such action or proceeding, and that where a marriage is dissolved both parties to the action shall be at liberty to marry again. Among all the subjects considered that of marriage and divorce, it appears, aroused the greatest difference of opinion. Mr. Stimson very properly points out that the law of corporations is one of the subjects most needing uniformity; but with the exception of marriage and divorce there is no subject wherein uniformity is more hopeless. The laws of adjoining States vary from laxity to extreme severity, giving corporations indefinite powers or limiting them to hardly any. He suggests two or three cardinal propositions which might be adopted in all States to the benefit of the country generally: First, that the capital stock of all corporations should be paid for in cash at par, and proper State regulations made to see that this was carried out; second, that this capital should be maintained unimpaired, and third, that the indebtedness of no corporation should exceed the amount of its capital stock. This is already the law in many States, and would inure to the great benefit both of investors and creditors throughout the Union if it could be made general; fourth, upon the important question of the transfer of stock, all will agree with Mr. Stimson in thinking that in view of the number of loans which are in modern times based on a pledge of stock by delivery of the certificate, that this delivery should be made, as it now is in Massachusetts, Rhode Island, and many States, sufficient to hold the stock in the hands of the person advancing the money on it as against any attaching creditor on the books of the corporation. There are in the address many other valuable suggestions in the direction of uniformity which it would be well for the commissioners to adopt.

NOTES OF RECENT DECISIONS.

CRIMINAL LAW — INCEST — INTERCOURSE WITH RELATIVE OF HALF BLOOD.—One of the points decided by the Supreme Court of Tennessee in Shelley v. State, 31 S. W. Rep. 492, is that brothers and sisters of half blood are included in a statute providing that no man "shall have carnal knowledge * * * of the daughter of his brother or sister." This precise question was before the Supreme Court of Vermont in the case of State v. Wyman, 59 Vt. 527, where the court said: "It was objected that the indictment was not sustained by proof that the respondent committed the offense with a daughter of his half-brother, it being claimed that the word brother in the statute was not broad enough to cover a brother of the half blood. In support of this claim it is urged that, at common law, a brother of the half blood is not a brother, and cannot inherit as such. It is true that by the common law a brother of the half blood could not inherit, but this was a rule for the regulation of the descent of property, and had no broader scope. It did not undertake to affect the relations of brethren of the half blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that on the descent of the inheritance a brother of the half blood should be left out. The common law rule, therefore, would have no force in a case of this kind, but the generally understood significance, and the word 'brother' as used in the common affairs of life, and as defined by lexicographers of recognized authority, should be adopted in the construction of the statute." See, also, Territory v. Corbett, 3 Mont. 50.

The court in the Tennessee case first referred to also hold that one who knowingly and voluntarily commits the crime of incest is an accomplice, and the other party cannot be convicted upon her uncorroborated testimony. In the case of Mercer v. State, 17 Tex. App. 452, it was held that, if a woman consents to the crime of incest, she is an accomplice, and a conviction cannot be had upon her unsupported testimony, and that she must be deemed to have consented, where she testifies that the crime was committed between her father and herself weekly for a period of eight years. Again, in the case of Watson v. State, 9 Tex. App. 237, the court said, viz.: "It was entirely upon the testimony of the defendant's daughter, with whom the incestuous intercourse is alleged to have occurred, that this conviction was obtained. It is contended by defendant's counsel that she was an accomplice in the of-

fense, and that, her testimony being uncorroborated in the manner required by law, the conviction is not sustained by sufficient evidence. If the witness knowingly, voluntarily, and with the same intent which actuated the defendant, united with him in the commission of the crime charged against him, she was an accomplice, and her uncorroborated testimony cannot support the conviction. But if, in the commission of the incestuous act, she was the victim of force, threats, fraud, or undue influence, so that she did not act voluntarily, and did not join in the commission of the act with the same intent that actuated the defendant, then she would not be an accomplice, and a conviction would stand even upon her uncorroborated testimony." Whart. Cr. Ev. § 440; Freeman v. State, 11 Tex. App. 92.

STATUTORY PENALTIES — ACTION TO RECOVER.—The Supreme Court of Nebraska in Omaha & R. V. R. Co. v. Hale, 63 N. W. Rep. 849, after a review of the authorities, which are somewhat in conflict, held that an informer cannot maintain an action in his own name to recover a penalty unless authorized so to do by statute. Rogan, C., says:

James B. Hale, suing for himself and the State of Nebraska, brought this suit to the District Court of Lancaster county, against the Omaha & Republican Valley Railroad Company, to recover the penalty denounced by section 104, ch. 16, Comp. St. 1893, against corporations owning railroads that had neglected to sound a whistle or ring a bell at railroad and street crossings. The petition contained 76 causes of action, substantially alike, and prayed judgment as follows: "Wherefore the plaintiff prays judgment against the defendant for the sum of $3,800 and costs of suits." Hale had a verdict and judgment, and the railroad company has prosecuted to this court a petition in error.

The section of the statute on which this action is based (said section 104) is as follows: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least thirty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and also be liable for all damages which shall be sustained by any person by reason of such neglect." Can the informer mentioned in said statute maintain an action in his own name to recover the penalty provided for therein? There seems to be some conflict among the authorities on this question.

In U. S. v. Laeseki, 29 Fed. Rep. 699, it was held that such an action must be brought in the name of the informer, and that the penalty could not be recovered by indictment at the instance of the government; but the statute on which that action was predicated provided that: "Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one-half to the use of the informer." Rev. St. U. S. § 5188. The word "recoverable," in this statute, would seem to authorize a suit for the penalty by the informer.

Railroad Co. v. Howard, 38 Ill. 415, was an action brought by Howard, suing for himself and the State of Illinois, against the railroad company. The statute on which the action was based provided that, if the railroad company should fail to sound a whistle or ring a bell, etc., "it shall forfeit a penalty of fifty dollars, one-half to the informer and the other half to the State." Laws 1849, p. 31, § 38. It is to be observed that this statute is almost identical with ours; and the court held that the suit was properly brought in the name of Howard.

In Lynch v. The Economy, 27 Wis. 69, it was held that the informer might maintain an action in his own name for the penalty. The court said: "The action is evidently a *qui tam* action, and we are inclined to hold may be brought in the name of the complainant (informer) alone. It is a general rule that a common informer cannot sue for a penalty unless authorized so to do by statute; but many cases hold, where the statute gives the forfeiture, or a part of it, 'to any person who shall prosecute therefor,' that this, or equivalent language, confers express authority upon him to sue in his own name. · · · But if there were any doubt upon this point it is removed by the language making the penalty a demand or lien against the boat, 'to be sued for and collected in the manner provided' for the collection of demands against boats and vessels. This language, we think, shows that the statute contemplated that the complainant (informer) should be the plaintiff in the action, and that the proceeding should be analogous to an ordinary suit for the collection of a demand against a vessel."

The statute of Arkansas provided that railroad companies should cause a whistle to be sounded or bell rung, etc., "under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county," etc. Mansf. Dig. § 5478. One Bell sued in his name, for the use of the State of Arkansas and Miller county, a railroad company, to recover the penalty provided for by said statute. The court said: "The demurrer to the complaint was properly sustained as it showed that the plaintiff, Bell, was not, and that the State was, the party entitled to prosecute the action." St. Louis, A. & T. Ry. Co. v. State (Ark.), 19 S. W. Rep. 572.

In Nye v. Lamphere, 2 Gray, 295, the court sustained a suit brought by an informer in his own name to recover a statutory penalty, but the statute on which the action was based provided that the penalty was "to be recovered in any court proper to try the same, one-half to the use of the said town and the other half to any person who shall prosecute therefor." St. 1851, ch. 98, § 1. This statute expressly conferred authority on the informer to prosecute the action. The court said: "The defendant's objection to the maintenance of this action is that the plaintiff is an informer, and therefore cannot sue in his own name, because authority so to sue is not given him by statute. And undoubtedly it is a general rule that a common informer cannot sue for a penalty, without express statuory authority. · · · But by what terms

in a statute is such authority conferrred? Certainly by terms like those used in the statute on which this action is brought, namely, by giving the forfeiture, or a part of it, to any person who shall prosecute therefor."

In Higby v. People, 4 Seam. 166, a suit was brought to recover a penalty in the name of the people. The statute provided that the penalty sued for should go to the informer and the county, and the court held that the State had no interest in the recovery, that, "the statute not authorizing the suit to be instituted in the name of the people, it was improperly brought, and the court erred in not dismissing it." Laws 1835, p. 63, § 2.

In Colburn v. Swett, 1 Metc. (Mass.) 232, it was held that: "As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute."

In Fleming v. Bailey, 5 East, 313, it was held that at common law an informer could not sue in his own name to recover a penalty; that he had no right to maintain an action for a penalty except such right was conferred by statute. To the same effect, see Barnard v. Gostling, 2 East, 569.

These authorities, we think, without serious conflict, recognize this rule: An informer cannot maintain an action in his own name to recover a penalty unless authorized so to do by statute. The statute on which this action is based does not expressly authorize the penalty denounced by said statute to be sued for and recovered by an informer, nor does the statute contain any language from which such an authority may be inferred. The act provides that the penalty shall be paid by the corporation owning the railroad. Paid to whom? We think, paid to the State. The corporation by violating the law forfeited to its sovereign, the State, not to the informer, the penalty denounced by the act. It is true that the law holds out an inducement to the citizen to inform the officers charged with the execution of the law of its violation, and in effect offers the informer a reward for his information; but it does not authorize the informer to bring the action, nor, when brought, to control it.

JUSTICE OF THE PEACE—VOID JUDGMENT—TRESPASS.—In McVea v. Walker, 31 S. W. Rep. 839, it is decided by the Court of Civil Appeals of Texas that a justice of the peace is liable in damages for injuries inflicted under color of a judgment rendered by him with knowledge that he was so related to one of the parties as to render the judgment void, and that one who commits a trespass under color of a void judgment rendered by a justice may be sued therefor jointly with the justice. The court says:

It is provided by law that "no justice of the peace shall sit in any cause where he may be interested, or where he may be related to either party within the third degree of consanguinity or affinity." Sayles' Civ. St. art. 1538. Vanfleet, in his work on "Collateral Attacks on Judicial Proceedings" (section 49), and the Supreme Courts of a few of the States, take the position that judgments rendered by a judicial officer in violation of the statute as to relationship are merely voidable, but the great weight of American authority s to the effect that they are absolutely null and void. Hall v. Thayer, 105 Mass. 219; Horton v. Howard, 44 N. W. Rep. 1112, 79 Mich. 642; Ferguson v. Crawford, 70 N. Y. 254; People v. Connor, 142 N. Y. 130, 36 N. E. Rep. 807, affirming same case in 20 N. Y. Supp. 200. To the same effect are the decisions in Texas. Chambers v. Hodges, 23 Tex. 104; Newcome v. Light, 58 Tex. 141; Templeton v. Giddings (Tex. Sup.), 12 S. W. Rep. 851; Winston v. Masterson (Tex. Civ. App.), 27 S. W. Rep. 691; Frieburg v. Isbell (Tex. Civ. App.), 25 S. W. Rep. 988. The justice of the peace having been, as alleged, related within the third degree to one of the parties to the suit, his judgment was absolutely void, and want of jurisdiction could be shown in a collateral proceeding; and, while appellant might have gained relief by appeal or *certiorari*, he was not compelled to do so. He had the right to proceed in an independent action for damages received under color of the authority given by the void judgment. Ferguson v. Crawford, 70 N. Y. 254. The justice of the peace being disqualified from sitting in the case by the plain, positive terms of the statute, there was no scope for the exercise of any judicial discretion on his part. It is alleged that the fact of his disqualification was brought before him, and that he had full knowledge of the same, and there is excellent authority for holding that he would be responsible for damages arising from his acts in rendering the judgment and issuing the writ by which the property was seized and converted. 2 Add. Torts, 966, p. 178; Inos v. Winspear, 18 Cal. 399; Clarke v. May, 2 Gray, 410; Piper v. Pearson, *Id.* 120. It is said in the Piper-Pearson Case: "If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice*, and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser." This is, as said in Clarke v. May, undoubtedly the law, when it is made to appear that the justice of the peace was cognizant of all the facts which constituted the defect of jurisdiction in the proceedings. Judicial officers will be protected in the fearless and impartial administration of justice so long as they act within the scope of their jurisdiction, but when they knowingly act outside of and beyond their jurisdiction their acts become a wanton and oppressive abuse of authority, and they will be held responsible as any other trespasser for the injuries arising out of their acts.

SALE—DEFAULT IN PAYMENT—WAIVER.—The Court of Appeals of Maryland decide in Cole v. Hines, 32 Atl. Rep. 196, that where goods are sold to be paid for in installments at specified times, title to remain in the seller till all payments are made, and the seller to have the right in case of default in any payment to treat the agreement as annulled, and retake the goods, or give more time, the granting of more time by the seller after a default is a waiver thereof, by which he is bound. The court says in part:

In all contracts where time is of the essence, a breach of the contract in that respect by one of the parties may be waived by the other party's subsequently treating the contract as still in force. Pinckney v. Dambmann, 72 Md. 178, 19 Atl. Rep. 450; Webb v. Hughes, L. R. 10 Eq. 281; Black v. Woodrow, 39 Me. 194. In these cases of conditional sales, the ac-

ceptance by the seller of an installment of the purchase money, after default, is a recognition of the contract as still subsisting, and a waiver of the forfeiture. Hutchings v. Munger, 41 N. Y. 158; Hurst v. Thompson, 73 Ala. 158. And other acts than acceptance may have the same effect. A party cannot take two inconsistent positions. If he has a right either to rescind a contract on account of a breach by the other party or to continue it in force, and he elects to continue it in force, he thereby abandons the right to rescind, and is bound by the election so made. Boldman v. Burt, 61 Md. 422; Manufacturing Co. v. Larentz, 44 Md. 233; Lawrence v. Dale, 3 Johns. Ch. 23. And so a vendor of chattels, where a fraud has been practiced, has a right either to affirm the contract and sue for the price or to rescind it and retake the goods, but he is bound by his first election. Troup v. Appleman, 52 Md. 456. In like manner a cause of forfeiture in a lease may be waived. In 1 Add. Cont. marg. p. 260, it is laid down that "the right of entry for forfeiture of a lease is governed by the general law that where a man has got a right to elect to do a thing to the injury of another his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease, or not, as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterwards annul the lease." Leake, Cont. (3d Ed.) p. 583, to the same effect. In such cases of a waiver of a forfeiture or of a right to rescind a contract, there is no necessity for a consideration, but the question turns rather upon the principle of election between two inconsistent rights. Bish. Cont. § 805; Johnston v. Whittemore, 27 Mich. 466; Manufacturing Co. v. Teetzlaff, 53 Wis. 220, 10 N. W. Rep. 155; Deyoe v. Jamison, 33 Mich. 94. A case similar in some respects to the case at bar is that of Albert v. Investment Co., L. R. 3 Q. B. 127, where Lord Cockburn said: "This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the installments of £2, which he is bound to do on each successive Monday till the loan is repaid. Now the facts are that the plaintiff's wife went to Bayne (who must be taken to have had full authority · · ·), and told him that her husband had difficulty in meeting the installment due on the 28th of August, and Bayne extended the time for payment of that and the next installment to the 11th of September. Now the bill of sale provides that if the mortgagor shall make 'default' in payment of the sum of £62. 10s., or any part thereof, the whole amount shall be then immediately due and payable, and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now 'default' must be taken to mean a non-payment by a party bound to pay, without the consent of the parties having a right to waive the payment; and I see nothing which goes to show that if, by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default." It is true that this case, so far as the meaning of the word "default" is concerned, was questioned by Lord Justice Bramwell in Williams v. Stern, 5 Q. B. Div. 412; but the bill of sale before the court in Williams v. Stern gave to the vendee a right to remove the property and sell it in the event of a failure to pay the installments when due, and such failure made the whole debt due. Unlike the case at bar, it did not provide for an election between a right to declare a forfeiture and a right to continue the contract in force. In Carpenter v. Blandford, 8 Barn. & C. 575, there was a waiver of a default in payment which was held to be binding. It appeared in this case that the defendant had agreed to sell to the plaintiff certain property at an appraisement to be made by appraisers to be appointed by the respective parties. The price was to be paid on or before March 25th, and the buyer deposited a sum to be forfeited if he did not complete the agreement. The appraisers met on March 25th, when plaintiff's appraiser said that he could not finish the work till the next day. No objection was then made, but on the next day the defendant refused to proceed. In deciding the question of his right to do so, Bayley, J., said: "The defendant in this case insists on a forfeiture which is *strictissimi juris*. He ought therefore to show that he has done everything which he was bound to do to entitle him to insist on the forfeiture, and that he has not done anything to waive that right. · · · It was the duty of defendant's agent to inform his principal that such a communication was made, and it must be presumed that he did so. If that communication was made, and the defendant meant to insist on the forfeiture, it was his duty to inform the plaintiff that he should insist on the forfeiture unless the contract was completed on that day." These principles are conclusive of the present case. The failure of the appellant to pay the installments when due was a default which did not render the contract void, or cause the entire purchase money to become due, but the contract was thereby made voidable at the option of the appellee. It was then necessary for the appellee to elect whether he would avoid the contract, retake the goods, and declare a forfeiture of the installments already paid, or whether he would continue it in force and become entitled to the future payments. He made his election to continue the contract in force by his notification to the appellant, who had a right to rely upon it, and, having thus waived the forfeiture on account of this particular default, it follows that he could not subsequently insist upon it.

CRIMINAL LAW—OBSCENE PUBLICATION—INDICTMENT.—In Commonwealth v. McCance, 41 N. E. Rep. 133, it is held by the Supreme Judicial Court of Massachusetts that on a prosecution for selling a book, only parts of which contain obscene language, if the language complained of is too obscene to place in the records, the indictment must identify by description or reference the parts containing the language upon which it is founded. Field, C. J., says:

The first precedent, so far as we know, for an indictment in this form is the second count in the indictment in Com. v. Holmes, 17 Mass. 335. In that case the court say: "The second and fifth counts in

this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it." This decision has been followed by many of the courts in this country. See People v. Girardin, 1 Mich. 90; State v. Pennington, 5 Lea, 506; McNair v. People, 89 Ill. 441; Fuller v. People, 92 Ill. 182; State v. Brown, 27 Vt. 619; State v. Griffin, 43 Tex. 538; State v. Smith, 17 R. I. 371, 22 Atl. Rep. 282; U. S. v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571. No authorities are cited in Com. v. Holmes, and the opinion in Com. v. Wright, 1 Cush. 46, shows that the decision in Com. v. Holmes must be regarded as an exception to the general rule of pleading relating to libelous publications. Com. v. Tarbox, 1 Cush. 66, decides that in an indictment for publishing an obscene paper, if the indictment purports to set out the alleged publication, it must do it in the very words of the paper, and the court say that "the excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment by proper averments." See Com. v. Dejardin, 126 Mass. 46. Com. v. Wright, 139 Mass. 382, 1 N. E. Rep. 411, where the indictment was quashed, decides that the indictment "must at least by some general description identify the paper" which is alleged to contain obscene matter, and which the defendant is charged with publishing. This question of the mode of pleading in cases of this kind was considered in England by the court of appeals, in Bradlaugh v. The Queen, 3 Q. B. Div. 607, and it was unanimously decided that the words alleged to be obscene must be set out according to their tenor. The two principal Massachusetts cases were considered, and the decision in Com. v. Holmes was not approved. *Id.* 620, 638, 641. But the weight of authority in this country is in favor of the decision in Com. v. Holmes, and the principle of that decision has been several times recognized by this court as correct, and we think that it must be regarded as an established rule of law in this commonwealth. It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameran of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many cultivated people of the world in Italy at the time. It was read for the entertainment of men and woman. Parts of it are coarse, and according to the standards of modern times, are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, "among other things, certain obscene, indecent, and impure language." If books of this character are to be regarded as within the provisions of St. 1890, ch. 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to certain other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be known that the indictment was founded upon the language which is put in evidence and relied upon at the trial. If the obscene language complained of is found only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages. The records of the court of common pleas or of the Supreme Judicial Court for the county of Worcester contained no copy of the book entitled "Memoirs of a Woman of Pleasure," referred to in the indictment in Com. v. Holmes, but apparently the whole book was presented, and the indictment was at common law. The statutes on the subject were first enacted here in Rev. St. ch. 130, § 10. It may be suggested that on a motion to quash the indictment the court cannot take judicial notice of the contents of the book referred to in the indictment. But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the part of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence so that the defendant could have known to what he was called upon to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed.

PUBLIC RECORDS — RIGHT TO INSPECT — ABSTRACT OF TITLE — MANDAMUS.—In Barber v. West Jersey Title & Guaranty Co., 32 Atl. Rep. 222, it is held by the Court of Errors and Appeals of New Jersey, in accordance with the weight of authority, that every person has the right of access to the public records of the county clerk's office, without the payment of fees to the clerk, to examine any title in which he is interested, subject to reasonable rules and regulations; that the respondent in the case has the same right of access to the records when employed to examine and guaranty the title to a particular piece of the property, but has not the right to occupy the office of the clerk for the purpose of making an abstract of the records, in order to set up and establish a rival business to the clerk, and that *mandamus* is the proper

remedy to enforce such right. Magie, J., dissented. The court says:

The respondent (complainant below) is a corporation of New Jersey organized for "the examination, insurance, and guaranty of the title to lands and estates, or interests in lands, in the several counties of this State, and the issuing of certificates, policies, contracts, and undertakings therefor, upon such terms and conditions, restrictions and limitations, as may be determined by said company." The defendant below and appellant here is the county clerk of the county of Camden. The complainant, in its bill, claimed the right to have free access to the public records and files in the office of said county clerk daily during the ordinary business hours of each business day, for the purpose of inspecting and making abstracts therefrom, and memoranda of the contents thereof; and prayed an injunction restraining the said clerk from interfering with the complainant in the exercise and enjoyment of such right. The decree of the chancellor was in favor of the complainant's claim, and an injunction was ordered accordingly.

The case of Lum v. McCarty, 39 N. J. Law, 287, is relied upon to support this decree. In that case Lum was employed to search a specified title, and this court held that he had a right of access to the records in the clerk's office for that purpose, without the payment of fees to the clerk. But that case is not authority for the contention that any one may occupy the office of the county clerk until he has made copies of all the records in the care of the clerk, for the purpose of setting up a rival office, whereby he will be deprived of the emoluments of his office. It is conceded that the corporation complainant is entitled to the same right of access to and examination of the public records of the county as an individual would be. "When employed to examine the title to any particular piece of property, such corporation is subrogated to the right of its employer to have such access, and the fact that it contemplates making a contract of guaranty of the title to the land in question does not detract from such right of access." Our act respecting conveyances, after providing for the recording of deeds in books to be furnished for that purpose, adds: "To which books every person shall have access, at proper seasons, and be entitled to transcripts from the same on paying the fees allowed by law." Lum v. McCarty, *supra*, construed this permission to mean that fees were to be paid to the clerk only when he made searches himself, and did not preclude a person interested from making searches for himself. The law makes it the duty of the clerk to take care of the public records in his office, but gives him no special fees for such service. The only compensation to him are the fees he receives in the ordinary course of his business for searches. To extend the right of search by others beyond this limit will deprive the clerk of the only remuneration he can have for the performance of this duty. In the absence of clear expression, it should not be so enlarged by construction.

In other States, where the statutory provisions are less favorable to the public officer, the courts have denied the right of any one to make at will an abstract of the official records. The statute of Michigan provides that the register of deeds shall furnish proper and reasonable facilities for the inspection and examination of the records in his office, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose. In Webber v. Townley, 43 Mich. 537, 5 N. W. Rep. 971, the application was to make an abstract of the titles to the lands for the purpose of carrying on the business of furnishing such abstracts to the public for compensation. The court said that the relators did not ask for an inspection of the record relating to lands in which they claimed to have any interest, or concerning which they desired to acquire an interest; on the contrary, that the right sought for by the relators was to enable them to furnish information to third parties for their own emolument, and that, inasmuch as the statute did not in clear and unmistakable terms grant such a right, it would not be given by construction. In the subsequent case of Burton v. Tuite, 78 Mich. 363, 44 N. W. Rep 282, a *mandamus* was issued to enforce the right of an individual to search a title in which he had a personal interest. In Buck v. Collins, 51 Ga. 391, under a statute providing "that all books kept by a public officer shall be subject to the inspection of all citizens," the Supreme Court of Georgia denied the right of the relator to inspect and make abstracts to be used by him in his business for his own profit. The same construction was put upon a like statute in Kansas. Cormack v. Walcott, 37 Kan. 391, 15 Pac. Rep. 245. The Prince George's County Abstract Company was incorporated by an act of the legislature of Maryland, which provided "that said corporation may make and may procure copies and abstracts from the public records of the State and gather information therefrom, and from other sources relating to conveyance of property, real and leasehold, make indexes of all deeds, mortgages, judgments, decrees and other records within the State of Maryland and may examine and guarantee titles to property, real and personal." Under this liberal legislation the Supreme Court of Maryland, in Belt v. Abstract Co., 20 Atl. Rep. 982, declared that said company had not the right to make searches and abstracts of title for their business without payment to the clerk of his statutory fees. The case of Lum v. McCarty carries the right of the public to its extreme limit. The respondent, by force of its incorporation, has the same right to inspect the public records which may lawfully be exercised by an individual. Every person without legislative authority, may engage in the business of examining and guarantying titles as fully as this company is empowered to do by its act of incorporation. When such a person or a company with such authority is employed to examine and guaranty a particular title, the clerk, upon demand, is bound to give access to the records for that purpose, subject to reasonable rules and regulations. With this limitation upon the right of the relator it seems clear that a court of equity is not the proper *forum* in which to enforce the performance of the duty, which in such a case falls upon the custodian of the records. "The doctrine that a court of equity will not act where there is a remedy at law is fundamental." New York & G. L. R. Co. v. Inhabitants of Township of Montclair, 47 N. J. Eq. 593, 21 Atl. Rep. 493. The proper province of writs of *mandamus* is to enjoin the doing of particular acts, and not to constrain a person to regulate his whole course of conduct according to some general principal. State v. Einstein, 46 N. J. Law, 479. In this case, the duty of the clerk being restricted to the performance of a specific act, and a complete remedy will be afforded by the writ of *mandamus*. The rights of the parties being settled, if the clerk refuses to accede to a proper demand made upon him, the court of law may impose such a penalty

as will command obedience to the law. It may also be within the power of the court to restrain the company from improperly using its privilege, as well as to coerce the clerk to permit its enjoyment. In our opinion, the decree below should be reversed, with costs.

DEBT, NOTE AND MORTGAGES AS INDEPENDENT ENTITIES.

If the relation of debtor and creditor has been established the instruments executed at the time of its creation contain the evidence of the existence of the debt. It was said by the court in Ballou v. Young,[1] that they are security for such debt. But while it is true that the mortgage is a security, it is not so easy to accept the statement that a promissory note is one also. In the hands of an indorsee or subsequent holder it may be more of a security because it has more signatures on it; but *per se* it is not a lien although it may be as much of a security as a bond where the note is held by an indorsee. However, as it is liable to be satisfied out of other property of the maker, at least for any deficiency in payment it may be regarded as a security to that extent. While the note and mortgage may be construed as one transaction, for the purpose of getting at the intention of the parties to them, still they are not necessarily dependent upon each other. In Ballou v. Young, *supra*, the Supreme Court of South Carolina held that authority given in a deed of trust "to mortgage" certain real estate did not empower the trustee to execute an accompanying promissory note as a part of the same thing as the mortgage deed—the security; for the liability created by the note might involve other of the trust property in its payment by reason of a sale of the real estate mortgaged, for a less sum than the indebtedness. This is taken to be the reason for the decision. But the court shows that the two instruments are separate and distinct because the remedy might be lost on the note, or that it could not be enforced as the contract entered into by reason of alterations made in it without consent of both parties.[2] The debt would still exist and, generally speaking, would be recited in the mortgage, although no personal liability for its payment would then exist, and the security alone must pay the debt.[3] And this is true if the mortgage be void. The debt would not be invalidated and recovery might be had within the statute bar.[4] The recital of the debt in the mortgage is evidence sufficient to show its existence, and if the amount of it is by mistake omitted in the defeasance clause of the instrument, it is not so far defective as to need reformation, and may be foreclosed by action and proof of debt be shown.[5] "The validity of the mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note, or bond, or otherwise. It rather depends upon the existence of the debt it is given to secure.[6]" So long as the debt is unpaid, the security for it is liable to be subjected to its payment unless the security has been released. But a discharge of the lien created for the purpose of payment of a debt will not operate to extinguish the latter, unless the personal obligation is barred. It has been held that parol evidence is admissible to show that a debt is unpaid where a satisfaction of it is set forth in an answer and proved, as a defense to the claim; and on the ground that the effect of a recorded certificate of discharge is only obligatory to the same extent that an ordinary receipt for money is—it contains no contract.[7] Neither can the purchaser of the property claim an extinguishment of the lien because he bought the property at a sale made under a judgment for the debt it secures.[8] Only the equity of redemption can be sold in such case, for the lien must be foreclosed to discharge the mortgage. But the *situs* of the lien does not fix the jurisdiction over the debt, for it has been held that an action on the note secured, brought in another State,[9] could be maintained on the ground that the note is primary evidence of the debt and the action on it is transitory. It is therefore independent of the security for the debt and if enforced in another jurisdiction for the whole debt it must have the effect of an abandonment of the mortgage as a

20 S. E. Rep. 84.

[2] Browne v. Browne, 17 Fla. 607; Plyler v. Elliott, 19 S. C. 257.

[3] Spencer v. Spencer, 95 N. Y. 353.

[4] Shaver v. Bear River, etc. Co., 10 Cal. 396.

[5] Burnett v. Wright, 135 N. Y. 543.

[6] Jones on Mortg., § 353; Thayer v. Mann, 19 Pick. 535.

[7] Thompson v. Layman, 41 Minn. 295.

[8] Jackson v. Hull, 10 Johns. 480.

[9] Lichty v. McMartin, 11 Kans. 424.

security. But a security may be resorted to if the judgment is in part unsatisfied.[10] It is unnecessary to cite authorities to the point that a creditor may resort to any or all of his remedies to enforce payment of debt, for the principle underlies all authorities quoted herein. But the peculiar case of an instrument both a promissory note and a mortgage may be noted.[11] It was held that the holder might recover a money judgment, or foreclose the writing as a mortgage at his option. So, too, a creditor may compel a surety on the mortgage note to pay it before resorting to the mortgage security.[12] In such case the surety would be subrogated to the creditor's rights in all the securities held by him. But a principal debtor who is compelled to pay his mortgage debt is not entitled to be subrogated to the mortgagee's rights to compel an execution creditor to pay off the first mortgage,[13] even if the property is worth more than the debt satisfied by the levy. Had he sustained the relation of surety his claim to subrogation would have been well founded. But a mortgagor may be discharged from his personal liability to a holder of the note where it is taken with notice of an agreement made between the maker and payee of the note that the former should be held harmless by the latter from a first mortgage assumed by him, which agreement is recited in the second mortgage given to secure the note in hands of such holder and the assignment thereof recites that the assignee takes the mortgage subject to the conditions therein. An action on the note was enjoined.[14] The executors of the second mortgage were compelled to buy the first mortgage to protect the estate from loss by foreclosure of the first mortgage and were held to the agreement as stated; and it really amounts to a novation of the debt. But novation pure and simple may be made upon express terms.[15] It must be something more than an agreement to be absolved from personal liability by the grantee to the grantor. It must include the creditor.

Sometimes the debtor is not personally bound to pay. If he gave no note or personal covenant and has not otherwise obligated himself, no personal judgment can be had against him.[16] And while it is competent for a creditor to release his debtor in that respect from a subsisting debt,[17] it may also be agreed that, where the makers of a note secured by mortgage are in fact principal and sureties, the property of the makers shall first be exhausted; and a sheriff's return of execution unsatisfied is a compliance with the terms of the agreement.[18] But a levy upon other property of the debtor may be out of the question by reason of a stipulation in the mortgage "that general execution shall not issue herein."[19] But in the absence of any agreement a creditors' bill may be maintained after judgment and return of execution unsatisfied, to reach the real and personal property of the debtor.[20] Of course taking property subject to mortgage then existing does not create any personal liability in the grantee of the land. And where a grantee of the mortgagor has assumed a mortgage on the property at the time of conveyance, but has conveyed it to another without an agreement to assume the mortgage, the privity of contract does not extend to the last grantee, and he is not personally liable to pay the mortgage debt.[21]

The debtor is released by joinder of the mortgagee in a conveyance of the property,[22] and the recital in the mortgage of the amount of the mortgage debt is not evidence of a promise made by the debtor to pay the debt, but is only a reservation made by him giving him the right to cancel the obligation and annul the mortgage.[23] The necessity of producing a mortgage note in proceedings to foreclose a mortgage is not obviated by the fact that the mortgage recites the note; and proof of it by copy without showing loss of original is error. The reason given is that the security furnishes no evidence that the holder of it is the real owner of the debt, for the debt evidenced by the note may be the

[10] Conn. Mut. L. I. Co. v. Jones, 1 McCrary, 388; Vansant v. Allmore, 23 Ill. 30.
[11] Frank v. Pickle, 2 Wash. T. 55.
[12] Allen v. Woodward, 125 Mass. 400.
[13] Rogers v. Meyers, 68 Ill. 92.
[14] Swett v. Sherman, 109 Mass. 231; Palmer v. Hendrie, 28 Beavan, 341.
[15] Lichty v. McMartin, *supra*.
[16] Halderman v. Woodward, 22 Kan. 512.
[17] Ball v. Wyeth, 99 Mass. 338.
[18] Riblet v. Davis, 24 Ohio St. 114.
[19] Kennion v. Kelsey, 10 Iowa, 443.
[20] Palmer v. Foote, 7 Paige, 437; Tucker v. McDonald, 105 Mass. 423.
[21] Brown v. Stillman, 43 Minn. 126; Nelson v. Rogers, 47 Minn. 103.
[22] Palmer v. Hendrie, *supra*.
[23] Weil v. Churchman, 52 Ia. 253.

property of another.[24] Extinguishment of the debt is the primary object, and the obligation rests upon the debtor. His responsibility does not cease so long as the debt exists, and it may be enforced against him while he has legal responsibility. It may be agreed between debtor and creditor that a specific part of the assets of the one shall be assigned to the other to secure the payment of the debt, but the creditor is not necessarily limited to that security to recover his debt. Outside of his collateral protection, he must seek his remedy within the time that personal liability may be enforced. If his security is void or is inadequate, he may subject the general assets of the debtor to payment of his debt, unless he has by agreement released them or himself from the power of the creditor. If his personal remedy be lost by neglect or through his own acts, he is limited to his security to satisfy his debt, either in part or in full. But while his personal remedy is subsisting he may release his security. He may sell the debt and its assignment will carry the security; but his transfer of the latter does not draw the debt to it. And when the debt is fully and fairly paid, the security for it is thereby released and the transaction is at an end.

Minneapolis, Minn. C. A. BUCKNAM.

[24] Lanfesty v. Coe, 16 South. Rep. 277.

HUSBAND AND WIFE—CURTESY—EFFECT OF DIVORCE—ADVERSE POSSESSION.

MEACHAM V. BUNTING.

Supreme Court of Illinois, June 15, 1895.

1. In 1856 a man bought land, and caused it to be conveyed to himself, "in trust for the use and benefit of" his wife. They had a child living at that time. Held, that he took a life estate in the land as tenant by the curtesy initiate.

2. A divorce granted to a husband for a cause which does not render the marriage void from the beginning does not terminate his estate by the curtesy initiate.

3. One who acquires possession of land as trustee for another cannot assert title by adverse possession against his *cestui que trust* without first surrendering and retaking possession.

WILKIN, J.: Urban D. Meacham and Prudence Geddis were married in 1836. They removed from Wisconsin to Freeport, this State, in 1852, and there lived as husband and wife until 1862. One son, born of this marriage in 1836, is still living. On the 29th of November, 1856, the husband purchased of one Sindlinger lots 6 and 7 in block 5 in Wright and Purinton's addition to the city of Freeport, the deed conveying the same to him, "in trust for the use and benefit of Prudence Meacham," then his wife. Both went into possession of the property in 1857, and occupied it as a home until 1862, and the husband continued in possession until his death in January, 1892. In 1864 he obtained a decree of divorce in the Circuit Court of Ogle county from his wife, and by a second marriage became the father of a daughter, Jessie, and a son, James. The mother of these children resided with the father on the premises until her death, and the children continued to live with him until he died. By a general devise in his last will their father gave these children the title he then held, if any, to the lots. The former wife also remarried, her present name being Prudence Bunting. In 1893 she brought action of ejectment in the court below, claiming said property as owner in fee, and making Jessie and James Meacham, with others, defendants. Issue being joined, and a trial by jury, the court directed a verdict for the plaintiff, and entered judgment accordingly. The defendants appeal.

By the pleadings the issue whether plaintiff's right of action was barred by the 20-years statute of limitations is properly raised, and is the controlling question in the case. The parties agree that by the terms of the deed from Sindlinger to Urban D. Meacham he became the naked trustee of his wife, Prudence, and that the legal title to the property conveyed would, therefore, under the general rule, vest in her by force of the statute of uses. It is also conceded that, inasmuch as she was not *sui juris* under the law in force at the time the deed was executed, the title did not immediately vest in her, but was left in her husband for her use. But counsel for appellants say the statute took effect, and she became seised of the estate in her own right, upon the dissolution of the marriage, in 1864, and from that time the possession of the husband was adverse; therefore the statute then run against her. On behalf of appellee it is contended that, even if the legal title did vest in her at the date of the decree of divorce, still, by reason of his marriage, and the prior birth of issue, her husband took an estate in the property upon the execution and delivery of the deed from Sindlinger, as tenant by the curtesy initiate, and hence this right of action did not accrue until his death. To the first of these positions opposing counsel insist that it is held the title does not, in such cases, vest in the *cestui que trust* immediately, for the very purpose of excluding all marital rights of the husband, and therefore Urban D. Meacham never became tenant by the curtesy; and, even if he did, the decree of divorce destroyed that as well as all other marital rights in him. Appellee's counsel also deny that Urban D. Meacham's possession was at any time adverse to her.

First. Did Urban D. Meacham have a life estate in the premises prior to the divorce? If the statute of uses had operated at the time of the

conveyance to vest the estate in the *cestui que trust*, the wife, there being issue then born, the husband would have become tenant by the curtesy initiate, precisely as though the deed from Sindlinger had been directly to her. But, being a married woman, the statute of uses did not execute the trust, and the legal title remained in her husband, the trustee, for her use. Dean v. Long, 122 Ill. 447, 14 N. E. Rep. 34; citing Perry, Trusts, § 310. This author says: "If an estate be given to trustees upon a trust for a married woman for her sole and separate use, * * * the legal estate will vest in the trustees, and the statute will not execute it in the *cestui que trust*. In all these cases the court will give this construction to the gift if possible, for, if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor. These are not the only words necessary to prevent the estate from vesting. Any words that show an intent to create an estate or a trust for the sole and separate use of a married woman will have the same effect." Other authorities are to the same effect, and it seems to be the settled rule that, where the trust is expressly "for the separate use" or "for the sole use and benefit" of a married woman, courts will not allow the statute to execute it in her, because the effect might be to let in marital rights of her husband, and thereby deprive her of the sole and separate use, contrary to the intention of the party creating the trust. Nevertheless, it is well understood that a husband's right to an estate by the curtesy may attach to an equitable as well as a legal estate held by his wife during coverture, and there can be no doubt that he may have such right in real estate conveyed to another for her use. Whether she holds the property by a direct conveyance, or as the *cestui que trust* therein, if it appears that the grantor intended to exclude the husband from the curtesy, courts will give effect to that intention. Pool v. Blakie, 53 Ill. 495; Monroe v. Van Meter, 100 Ill. 347. But the husband can be deprived of his marital rights only when the intention to do so clearly appears. Carter v. Dale, 3 Lea, 710; Cushing v. Blake, 30 N. J. Eq. 689; Hill, Trusts, 405; Steadman v. Palling, 3 Atk. 423; Tyler, Cov. There is nothing in the language of the deed in question to indicate a purpose on the part of the grantor to convey the property for the sole and separate use of Prudence Meacham. In fact, the fair inference is that Sindlinger, the grantor, had no purpose whatever in conveying the lots in trust, except to carry out the wish of Mr. Meacham, who purchased them. That he (the husband) intended by the words, "in trust for the use and benefit of Prudence Meacham," to exclude himself from all right in the property by the curtesy cannot be presumed, and his conduct after the divorce was wholly inconsistent with any such intention. We think the authorities fully sustain the position that he, at the date of the Sindlinger deed, became tenant by the curtesy initiate in the premises.

Was that estate destroyed by the decree of divorce? While the evidence does not show the grounds upon which it was obtained, it does appear that it was upon the application of the husband, and must therefore have been rendered not for his fault, but that of the defendant, his wife. While many cases hold "a divorce *a vinculo* destroys the husband's right to curtesy," they speak of such a divorce as at common law, which rendered the marriage void *ab initio*. Although the only divorce known to our law is "*a vinculo*," it may, under the statute, be granted for causes arising after the marriage; and the decree does not avoid it from the beginning. The marriage is legal until dissolved, and we think rights acquired during its legal existence cannot be destroyed by its dissolution, unless the statute so expressly provides. This view is sustained by the case of Wait v. Wait, 4 N. Y. 95. The New York statute said: "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." The court of appeals held, where a divorce was granted for any other cause than the misconduct of the wife, she was entitled to dower, and said: "A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. * * * Until our statute, there was no such thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of law under whose authority it is granted. The common-law divorce avoided the marriage, and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights it conferred and obligations it imposed continue where the legislature has failed to interfere. In determining the question before us, therefore, we are to ascertain the will of the legislature, the intent and effect of the statute under which the divorce in question was granted. When a divorce is under the statute, the operation of the decree is wholly prospective. * * * If it was the intention of the legislature that, in case of a divorce under the statute, the wife should in no event be entitled to dower, why not make the provision general, instead of depriving the wife of dower only in case of her being convicted of adultery? '*Expressio unius exclusio alterius.*'" When the decree in question was obtained our statute provided: "If any

woman shall be divorced from her husband for the fault or misconduct of such husband, except where the marriage was void from the beginning, she shall not thereby lose her dower, nor the benefit of such jointure; but if such divorce be for her fault or misconduct she shall forfeit the same; and when a divorce is obtained for the fault and misconduct of the husband, he shall lose his right to be tenant by the curtesy in the wife's lands, and also any estate granted therein by the laws of this State." Chancery Code (Scates, Treat & Blackwell's Ed.) St. 1858, No. 7, § 12, tit. "Dower." Certainly it did not take away the husband's right to be tenant by the curtesy in his divorced wife's lands, but clearly shows an intention by the legislature to secure him in that right, if the divorce was obtained for causes other than his fault or misconduct. As said in Wait v. Wait, *supra*, if the legislature intended that, in case of divorce under the statute, the husband should in no event be entitled to tenancy by the curtesy, why not make the provision general, instead of only in case of the divorce being obtained for his fault? The husband's tenancy by the curtesy initiate was not defeated by the decree of divorce in his favor, but terminated only upon his death; and therefore the appellee's right of action did not accrue until he died, in 1893. The possession of land by a tenant for life cannot be adverse to the remainder-man or reversioner. Mettler v. Miller, 129 Ill. 630, 22 N. E. Rep. 529, and cases cited.

We are also of opinion that, without reference to his tenancy by the curtesy, the possession of Urban D. Meacham was at no time adverse to appellee, within the meaning of the statute of limitations. He entered under the Sindlinger deed, and *prima facie* continued to hold possession under it. If the defendants below, claiming under him, denied that fact, the burden was upon them to prove it; and this they wholly failed to do. Adverse possession, sufficient to defeat the legal title, must be hostile in its inception, and continue uninterruptedly for 20 years. It must be acquired and retained under claim of title inconsistent with that of the true owner. Turney v. Chamberlain, 15 Ill. 271. See, also, Morse v. Seibold, 147 Ill. 318, 35 N. E. Rep. 369, and cases cited. He entered as trustee under the Sindlinger deed, and he could only afterwards claim to hold adversely to that title by surrendering the possession, and retaking it. O'Halloran v. Fitzgerald, 71 Ill. 53; Reynolds v. Sumner, 126 Ill. 58, 18 N. E. Rep. 334. The entry was with appellee's consent, and therefore not adverse. Timmons v. Kidwell, 138 Ill. 12, 27 N. E. Rep. 756. The possession was consistent with the title of the real owner, and "nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner would render the possession, however long-continued, adverse." Rigg v. Cook, 4 Gilman, 351, followed by Transportation Co. v. Gill, 111 Ill. 541. No other verdict than that which the jury was instructed to return could have been properly rendered in this case. The judgment of the Circuit Court will be affirmed. Affirmed.

NOTE.—The conclusion of the principal case would seem to be sound. Although the husband paid for the land, as the title stood on the records, he became a trustee, and his wife the *cestui que trust*. Upon the birth of the child he became a tenant by the curtesy initiate of his wife's land, which tenancy could not become complete or "consummate" until the death of the wife. The husband died and the curtesy initiate or possible estate died also, or rather never became complete. The divorce did not destroy the husband's interest in the lands, nor did his possession at the date of the divorce become adverse. Hence, it follows that the limitation necessary to confer title by adverse possession did not begin to run until after the death of the husband.

Curtesy.—Many States have expressly abolished the estate by the curtesy, others have retained it as at common law, others have enacted modifications, and still others do not mention this estate in the statutes. In some States the husband has the right of dower in his wife's lands. Stewart on Husb. & Wife, § 160; Stimson, Am. Stat. Law, § 3300 *et seq.*

It has been held in Rhode Island that a husband who obtained a divorce from his wife in that State in 1890, on the grounds of extreme cruelty, had no interest as tenant by the curtesy, in the real estate owned by the wife at the time of the granting of the divorce; she having purchased said estate in 1878, and having no children by him born alive, during the subsistence of the marriage. Burgess v. Muldoon (R. I.), 29 Atl. Rep. 298; Ryan v. Freeman, 36 Miss. 175; Doe v. Killen, 5 Del. 14; Taliaferro v. Burwell, 5 Call. (Va.) 321.

The husband became tenant by curtesy initiate of all real estate of the wife, at common law, upon birth of living issue of the marriage, but only became tenant by the curtesy consummate by her death. Day v. Cochran, 24 Miss. 261; 4 Am. & Eng. Ency. of Law, 958; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 95, 102, 15 Am. Dec. 433; Rawlings v. Adams, 7 Md. 26; Carpenter v. Garrett, 75 Va. 129, 133; Carrington v. Richardson, 79 Ala. 101, 104; Winkler v. Winkler, 18 W. Va. 455. To constitute tenancy by the curtesy consummate, three things must occur while the marriage continues, namely, seizin of the wife, issue born alive capable of inheriting, and death of the wife. Wheeler v. Hotchkiss, 10 Conn. 230; Gould v. Crow, 57 Mo. 204; Barrett v. Failing, 111 U. S. 524; Schouler's Husb. & Wife, § 419. Upon the birth of the issue the curtesy becomes initiate or possible. After the wife's death the curtesy becomes consummate or complete. Schouler's Dom. Rel. (4th ed.) § 202; 1 Washburn's Real Prop. 130; 4 Kent's Com. 27-35; Williams' Real Prop. (8th ed.) 218.

Adverse Possession.—Where an entry upon land is made with the consent of the owner, and subservient to his claim of title, the law will presume that the continued possession is subordinate to the superior title of the owner. Union Pac. Ry. Co. v. Kindred, 43 Kan. 134. Such presumption arises where one enters under a bond for a deed. Knox v. Hook, 12 Mass. 329. So, it has been held in South Carolina that, the possession of a devisee is not presumed to be adverse to the creditors of the deceased. Roberts v. Smith, 21 S. C. 445. Likewise the doctrine applies to the possession of the joint estate by one of several tenants in common. Peters v. Jones, 35 Iowa, 512; McClung v. Ross, 5 Wheat. 124; Campbell v. Laclede, 84 Mo. 352; Linker v. Benson, 67 N. C. 150; Ball v. Palmer, 81 Ill.

370; Winter v. Haines, 84 Ill. 585. For equally good reason the rule is applied to the possession of the trustee under a trust. The trustee's possession is subordinate to that of the *cestui que trust*. It has been held that in no case will the possession of the trustee be deemed to be adverse to the *cestui que trust*. He cannot disseize the *cestui que trust*. Zellers' Lessee v. Eckert, 4 How. 295; Decouche v. Lavetier, 3 Johns. Ch. 216; *Contra:* Schlessinger v. Mallard, 70 Cal. 326; Hall v. Ditto (Ky.), 12 S. W. Rep. 941. However, it has been held that a disseisin of the trustee will work a disseisin of the *cestui que trust*. Tiedeman on Real Prop., § 451. One who asserts title by adverse possession must show that the holder of the legal title knew that he claimed in his own right, or that the possession was so open and notorious as to raise the presumption of notice. Eureka Co. v. Norment (Ala.), 16 Southern Rep. 579. A trustee may disavow or disclaim that he is a trustee or holds the property for the *cestui que trusts*, but such disclaim must be accompanied and established by visible and notorious acts, inconsistent with the ownership of the supposed disseisee, such as a refusal to recognize the claim to the profits, or a share therein. Tiedeman on Real Prop., § 700, p. 667; Ripley v. Bates, 110 Mass. 162; Holley v. Hawley, 39 Vt. 534.

CORRESPONDENCE.

CONTRACT OF SERVICE — PAYMENT BY INSTALLMENTS.

To the Editor of the Central Law Journal:

For some time I have felt inclined to write relative to note and citation of authorities therein, to case of McMullen v. Dickenson Co. (Sup. Ct. Minn.), page 300, CENTRAL LAW JOURNAL, of April 12th, 1895, Contract of Service—Payment by Installments—Damages. In the note you cite only Booge v. Railroad Co., 33 Mo. 212. There are two others, 14 Mo. App. 489, and 22 Mo. App. 281. On the other side you cite none—yet the contrary rule is most forcibly presented in 59 Mo. 355, 53 Mo. 176, 92 Mo. 242, 49 Mo. App. 201, 54 Mo. App. 336. In 59 Mo. 355, the court say on last paragraph page 362 "and even where several claims payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues." 92 Mo. on page 250, Adler v. R. C. S. & M. Ry. Co., the court says: "while the contract is entire there can be no doubt . . . that each monthly payment, as it became due, constituted a separate demand for the recovery of which an action could be maintained. . . ." In West v. Moser, 49 Mo. App. Ct. 201, the court said: "Now, it is settled law, that where payments are to be made under a contract in installments, a separate right of action accrues to recover each installment whenever that installment is due and not paid." This case is in exact line with the Minnesota case and uses the 59 Mo. and 92 Mo. as authority. In the Minnesota case it was a contract for years, payable monthly. West v. Moser is an entire contract payable monthly. In both, breach of contract is alleged and proven, and in both the courts hold that an action for each monthly installment can be maintained. The Mo. App. invoke the 59 Mo. and 92 Mo. to sustain it, where the principle of law is declared that where a contract provides for monthly payments a separate action can be maintained for each monthly installment due and unpaid. This is in direct conflict with Booge v. Ry. Co., 33 Mo. 212. While not expressly overruling it they clearly do so. To have cited them in the note it would have shown the Missouri courts to be in line with the principle announced in the Minnesota decision. Pardon me for writing but I thought the omission to be accidental. L.

St. Joseph, Mo.

JETSAM AND FLOTSAM.

TWICE IN JEOPARDY.

If the newspaper accounts are correct, the Supreme Court of Connecticut has recently rendered a decision which will attract much attention. It is reported that in a criminal case (State v. Lee) the State has secured a new trial on appeal of error of law. In the court below the prisoner was acquitted of having caused the death of a patient by a criminal operation. By the decision of the Supreme Court he is subjected to a second trial without his consent. There is no reason to believe this decision unsound. The fifth amendment of the United States constitution, provided that no person be "subject for the same offense to be twice put in jeopardy of life or limb" is now admitted to be a restriction on the Federal government alone. 108 Mass. 5; 7 Peters, 243; 20 How. 84. The constitution of Connecticut contains nothing on the subject, so that a statute providing for a second jeopardy would be constitutional. Green Bag, vi. 373. Connecticut has a statute allowing the State an appeal for error of law in criminal cases. (Gen. Stat. Conn. § 1637, being Conn. Stat. 1886, ch. 15.) Several other States having similar statutes, but they are not construed to give the prosecution a new trial after acquittal. Cf. McClain's Iowa Code, §§ 5921, 5923; Bish. New Crim. Law, 8th Ed., I. § 1024. That is, however, because of restrictions in the State constitution as to second prosecutions. In Maryland, where no such restriction is contained in the constitution, the State has been allowed to secure on writ of error a reversal of a judgment given in favor of the defendant; and this, apparently, in the absence of statute. State v. Buchannan, 5 Har. & J. 317. In Connecticut there is no constitutional difficulty in the way, and there does not seem to be any very good reason why the plain words of the statute should not be given the meaning attached to them in the State v. Lee.—*West Va. Bar.*

HUMORS OF THE LAW.

Texas Justice—"You admit you stole the pig out of the pen?" Colored Prisoner—"Yas, I admits I stole de pig, but I wus hongry, an' I didn't have nuffin' ter eat." "Pork reacher," said the judge, with tears in his eyes, as he chalked him down for two years.

"Did you ever surrender yourself to the police?" asked Plotting Pete.

"No, sir," replied Meandering Mike. "I'm a firm believer in the principle the orficer should seek the man; not the man the orficer."

Minneapolis Man (to visitor)—"Well, what do you think of our city?"

Visitor—"Very nice town, indeed."

"What do you think of our trolly cars?"

"Oh, they're just killin.' "

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE — Application.—Where the application expressly made a part of the policy provides that the company shall not be liable for injury or death happening prior to the "receipt and acceptance" of the application and membership fee, the contract does not take effect until acceptance, and the company is not estopped to deny liability for death occurring prior thereto by having received the application and retained the fee.—COKER v. ATLAS ACC. INS. CO., Tex., 31 S. W. Rep. 703.

2. ALTERATION OF INSTRUMENT — Bond.—An interlineation in an instrument will be presumed to have been made before its execution, so that one claiming the contrary must prove it.—KLEEB v. BARD, Wash., 40 Pac. Rep. 733.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A judgment confessed by a debtor in failing circumstances in favor of a creditor, which, when recorded, became a lien on all the property of the debtor, is not a general assignment, within Pamph. Acts 1892-93, p. 1046, providing that every general assignment in payment of a prior debt by which a payment or priority is given over the remaining creditors shall inure to the benefit of all the creditors equally.—BELL v. GOETTER, Ala., 17 South. Rep. 709.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An insolvent debtor conveyed his land to a trustee by trust deed in the nature of a mortgage, to secure his creditors named therein, reserving the right to redeem any part of the land on payment of a named sum for each part, and, as additional security, he pledged certain personal property to such trustee: Held, that these transfers did not constitute an assignment for the benefit of creditors.—WRIGHT v. HUTCHINSON, Ill., 41 N. E. Rep. 172.

5. ATTACHMENT — Sufficiency of Affidavit.—In a statute which makes it ground for attachment that defendant has disposed of his property with intent to cheat, hinder, and delay his creditors, or is about to do so with the same intent (Mansf. Dig. Ark. ch. 39, § 309, subds. 6 8), the word "property" does not mean all the debtor's property, and hence there is no inconsistency in alleging in the affidavit for attachment that defendants have disposed of their property, and that they are about to dispose of the same.—SALMON v. MILLS, U. S. C. C. of App., 68 Fed. Rep. 180.

6. ATTACHMENT—Wrongful Attachment—Damages.—In an action for wrongful attachment against the attorney for the plaintiff in the writ the recovery is limited to the goods shown by the officer's return to have been levied on, it not being permissible to show that additional goods were seized.—MATTHEWS v. BOYDSTUN, Tex., 31 S. W. Rep. 814.

7. ATTACHMENT — Rights of Wife — Exemptions.—A wife of a merchant who has absconded and abandoned his business cannot recover the value of merchandise set apart to the husband as exempt, but subsequently again seized by his creditors under an attachment, as the husband may abandon such exemption.—BETZ v. BRENNER, Mich., 63 N. W. Rep. 970.

8. ATTORNEY—Disbarment—Mutilation of Records.—Where, on appeal from a conviction of murder, the record is so mutilated as to suppress the proof of the *corpus delicti*, and to falsely make it appear that defendant was improperly cross examined as to matters to which he had not testified in chief, the attorney who tried the case will not be disbarred from arguing the appeal from the record as filed, it not being shown that he had any connection with the mutilation of the record.—STATE v. MULLINS, Mo., 31 S. W. Rep. 744.

9. BOND — Measure of Damages.—The measure of damages, as against the sureties, for a breach in the condition of a bond executed by a mortgagor to the mortgagee, to the effect that the former will rebuild a house destroyed by fire on the mortgaged premises, is the difference, at the time of the breach, between the value of the premises without the house built thereon, and the amount of the mortgage debt, not exceeding the amount which the rebuilding of the house would have increased the value of such premises.—LONGFELLOW v. MCGREGOR, Minn., 63 N. W. Rep. 103.

10. BUILDING ASSOCIATION—Members.—The members of a building association, whether borrowers or non-borrowers, have a mutual interest in its affairs, and, sharing alike in its earnings, must assist alike in bearing its losses.—EVERSMANN v. SCHMITT, Ohio, 41 N. E. Rep. 189.

11. CARRIERS OF PASSENGERS — Street Railway.—A petition in an action against a street railway company, which alleges that, after plaintiff purchased his ticket, he entered defendant's car, and was ejected therefrom by defendant's servants, and prays for damages, states an action in tort, and not one for breach of contract.—DENVER TRAMWAY CO. v. CLOUD, Colo., 40 Pac. Rep. 779.

12. CARRIERS OF PASSENGERS — Evidence.—In an action against a street-railway company for injuries to a passenger resulting from being thrown off a car while turning a curve, the rate at which the car was going is immaterial, if it is shown that its speed was improper.—GIDIONSEN v. UNION DEPOT RY. CO., Mo., 31 S. W. Rep. 800.

13. CERTIORARI — Appeal by Garnishee.—Where a garnishee appeals from a judgment against him in a justice court, the principal debtor cannot also bring up the garnishee proceedings for review by *certiorari*.—LICHTENBERG v. HOSMER, Mich., 63 N. W. Rep. 963.

14. CHATTEL MORTGAGE ON CROPS.—When a mortgage is given on crops, not yet in existence, and to be grown on land to which the mortgagor has no lease at the time, equity will enforce the mortgage as a lien on the crops when they do come into the possession of the mortgagor, when their acquisition was contemplated at the time the mortgage was made.—RICHARDSON v. WASHINGTON, Tex., 31 S. W. Rep. 614.

15. CHATTEL MORTGAGE — Failure to Record.—Under Gen. St. § 1648, making a mortgage of personal property void, as against creditors, unless recorded, a receiver of the mortgaged property, appointed in an ac-

tion on a debt incurred by the mortgagor after the mortgage was made, but before it was recorded, has a right thereto prior to the mortgagee, though he was appointed after the mortgage was recorded.—WILLAMETTE CASKET CO. v. CROSS UNDERTAKING CO., Wash., 40 Pac. Rep. 729.

16. CONFLICT OF LAWS — Notes Void for Usury.—The maker of a note, resident in Alabama, wrote to the payee, resident in Tennessee, requesting a renewal on payment of accrued interest and the giving of a renewal note. The payee inclosed a renewal note, dated at the maker's town, but payable in Tennessee, which provided for the payment of attorney's fees and costs of collection. The maker erased such provision, and the note was signed and returned, without payment of the accrued interest, with the request that it be credited on the old note, and the latter retained until the accrued interest should be paid. The payee accepted the note as altered: Held, that the renewal note was a Tennessee note, and governed by the laws of that State as to usury.—MCGARRY v. NICKLIN, Ala., 17 South. Rep. 726.

17. CONTRACT TO EMPLOY — Novation.—Where one enters into a contract to employ another at a fixed rate for a time certain, and afterwards disposes of the business in which the services are to be rendered to a third person, and such third person retains the servant in his employment and pays him at the contract rate for several months, this is sufficient evidence of novation to charge such third person with the obligations of the contract.—CULBERTSON IRRIGATING & WATER POWER CO. v. WILDMAN, Neb., 63 N. W. Rep. 947.

18. CONTRACT TO CARRY MAIL.—The general government has control of all contracts and subcontracts. They are governed by special regulations, and the laws applying to other contracts, regarding the placing in default, do not apply to these government contracts.—LOGAN v. WOODLIEF, La., 17 South. Rep. 698.

19. CONTRACTS — Liabilities of Purchaser.—A street-railway company who had issued to plaintiff a pass for life sold its road to defendant: Held that, in the absence of an agreement on defendant's part to assume its grantee's liability on the pass, plaintiff could not recover damages for failure of defendant to recognize the pass.—DALLAS CONSOL. TRACTION RY. CO. v. MADDOX, Tex., 31 S. W. Rep. 702.

20. CONTRACT TO CONVEY LAND — Mutuality.—A contract for the conveyance of land within a certain time, if the vendor within that time obtain title thereto by patent from the government, for an agreed price, money paid on the purchase price to be repaid to the vendee, without interest, if the vendor fail to obtain a patent,—is not void for lack of mutuality or consideration.—SOUTHERN PAC. R. CO. v. ALLEN, Cal., 40 Pac. Rep. 752.

21. CONSTITUTIONAL LAW—Interstate Commerce—Express Companies.—An ordinance imposing a license tax upon "every express company having an office in the city of A, Va., and receiving goods, and forwarding them to points within the State of Virginia, or receiving goods within the State of Virginia, and delivering them in the city of A," is repugnant to the interstate commerce law, and is void.—WEBSTER v. BELL, U. S. C. C. of App., 68 Fed. Rep. 183.

22. CONSTITUTIONAL LAW — Regulation of Horse Racing.—Act March 5, 1895, which makes horse racing, except as allowed by the act, a misdemeanor, and authorizes a civil suit against any person violating its provision, does not, by authorizing the issuance of an injunction without bond against the defendant in such suit, deprive him, if the owner of the property used in connection with the race, of his property without due process of law.—STATE v. ROBY, Ind., 41 N. E. Rep. 145.

23. CORPORATIONS — Stock — Title.—Mere delivery of stock as a pledge, without any transfer by indorsement, does not pass title.—WAGNER v. MARPLE, Tex., 31 S. W. Rep. 691.

24. CORPORATION — Stockholder—Equitable Proceeding.—In an equitable proceeding by a judgment creditor of a corporation against a stockholder to enforce the latter's liability for the balance unpaid on his stock, the stockholder may set off any demand he may have against the corporation, though the petition alleges that the suit is brought on behalf of plaintiff and such other creditors as may come in, it not appearing that any other creditor has joined in the suit.—WASHINGTON SAV. BANK v. BUTCHERS' & DROVERS' BANK OF ST. LOUIS, Mo., 31 S. W. Rep. 761.

25. CORPORATION — Charter — Construction. — The policy of the State of Missouri, as shown by its general legislation, is unfavorable to the unlimited duration of purely business corporations, and all doubts in corporate charters will be resolved against an intention to grant perpetual existence.—STATE v. PAYNE, Mo., 31 S. W. Rep. 797.

26. CORPORATIONS — Identity of Stockholders.—The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other, through ownership of its stock, or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one, so as to make a contract of one corporation binding upon the other.—RICHMOND & I. CONST. CO. v. RICHMOND, N., I. & B. R. Co., U. S. C. C. of App., 68 Fed. Rep. 105.

27. CORPORATION — Street Railroads—Lien of Judgment.—The Iowa statute (McClain's Code, § 2008), making a judgment against any railway corporation, for injury to person or property, a lien superior to that of mortgages on its property, does not apply to street railway corporations.—MANHATTAN TRUST CO. v. SIOUX CITY CABLE RY. CO., U. S. C. C. (Iowa), 68 Fed. Rep. 82.

28. CORPORATION—Conspiracy — Evidence. — Where the president of a corporation, acting within the scope of his authority, in furtherance of the corporation's interests, conspires with other officers of the company to secure possession of premises leased by it, and drive the lessee out of business, and wrongfully sues out a distress warrant for that purpose, the corporation, having ratified such acts, will be liable both for actual and exemplary damages.—TEXAS & P. COAL CO. v. LAWSON, Tex., 31 S. W. Rep. 843.

29. CORPORATION— Insolvent Corporations.—Directors as Creditors.—A manufacturing corporation which, although insolvent, is still engaged in business, may give judgment notes to its directors for money lent to it by them, in good faith, for the purpose of carrying on its business while it was insolvent, and may also give them judgment notes in renewal of similar notes given by the corporation while it was solvent.—ILLINOIS STEEL CO. v. O'DONNELL, Ill., 41 N. E. Rep. 185.

30. CORPORATIONS—Transfers of Stock—Notice.—The statutes of Connecticut provide (Gen. St. § 1924) that no pledge of stock of a corporation organized under the laws of that State shall be effectual except as against the pledgor or his executors or administrators, unless it is consummated by an actual transfer of the stock, or a copy of the power of attorney to transfer is filed with the officers of the corporation: Held, that the purpose of this statute is to protect persons dealing upon the faith of the apparent ownership of the stock in ignorance of the pledge, and accordingly actual notice thereof is equivalent to a transfer on the books, or the filing of the power of attorney.—HOTCHKISS & UPSON CO. v. UNION NAT. BANK, U. S. C. C. of App., 68 Fed. Rep. 76.

31. COURT—Jurisdiction—Collateral Attack.— Where a probate court in Louisiana has assumed to grant administration upon the estate of one who, at the time of his death, was in fact a resident of Mississippi, and whose estate has been judicially administered there, such action of the court is wholly unauthorized by law, and its decree can be impeached collaterally.—FLETCHER v. MCARTHUR, U. S. C. C. of App., 68 Fed Rep. 65.

32. CREDITORS' BILL — Fraudulent Conveyance.—In an action by creditors to set aside a deed, evidence that it was made by a debtor to his children for services rendered by them is not admissible to contradict a recital that it was made for a nominal consideration, especially where the debtor was legally entitled to such services.—OGDEN STATE BANK v. BARKER, Utah, 40 Pac. Rep. 765.

33. CRIMINAL EVIDENCE—Confession. — Where a defendant, of his own accord, appears and testifies before the grand jury, his confession is not inadmissible, not being voluntary, because an officer had advised him to confess to another officer, and had promised him aid if he would do so.—PARIS v. STATE, Tex., 31 S. W. Rep. 855.

34. CRIMINAL EVIDENCE — Disorderly House.—On a prosecution for keeping a house of ill fame, under the statute making penal the keeping of a "house of ill-fame, resorted to for the purpose of prostitution or lewdness," it was material error, in the absence of a showing that respondent was not prejudiced, to admit proof that the character of the house was reputed to be bad.—STATE v. PLANT, Vt., 32 Atl. Rep. 237.

35. CRIMINAL EVIDENCE—Homicide — Declarations.—On a trial for murder the declarations of the deceased to third persons prior to the killing as to the designs of the prisoner against deceased's wife are inadmissible against the prisoner.—PEOPLE v. GRESS, Cal., 40 Pac. Rep. 752.

36. CRIMINAL LAW—Witness.—Const. U. S. Amend. 6, providing that in criminal prosecutions the accused shall have the right to be confronted with the witnesses against him, applies only to trials in the federal courts of parties charged with a violation of the constitution of the United States or of the laws of congress.—RYAN v. PEOPLE, Colo., 40 Pac. Rep. 775.

37. CRIMINAL LAW—Bigamy—Evidence.—Under Rev. St. 1893, ch. 38, § 29, which provides that in prosecutions for bigamy either marriage "may be proved by such evidence as is admissible to prove a marriage in other cases," in order to prove a common-law marriage in such a prosecution there must be evidence of a contract *per verba de præsenti*, with proof of cohabitation. Proof that the parties lived together as husband and wife, and spoke of each other as such, is not sufficient.—HILER v. PEOPLE, Ill., 41 N. E. Rep. 181.

38. CRIMINAL LAW—False Pretenses.—On a prosecution for obtaining money under false pretenses, the fact that the defendant is able and willing to repay the money so obtained is no defense.—PEOPLE v. OSCAR, Mich., 63 N. W. Rep. 971.

39. CRIMINAL LAW.—To constitute the crime of incest, the assent of both parties is necessary.—PEOPLE v. BURWELL, Mich., 63 N. W. Rep. 986.

40. CRIMINAL LAW—Instructions.—On a trial for perjury, a charge that the jury must not allow their personal knowledge of defendant's mental condition to influence their verdict is correct.—STATE v. GAYMON, S. Car., 22 S. E. Rep. 805.

41. CRIMINAL LAW — Rescission of Fine by Governor.—The remission by the governor of a fine of $50, and of the judgment therefor, "hereby absolving him from the payment of said sum of fifty dollars, of the said judgment, and all the effects and consequences thereof," absolves defendant from imprisonment for the costs of the prosecution.—EX PARTE PURCELL, Ark., 31 S. W. Rep. 738.

42. CRIMINAL LAW—Former Jeopardy.—A conviction for a breach of the peace by shooting firearms in a town is a bar to an indictment for injuring a courthouse, under St. § 1258, providing that any person who willfully and unlawfully injures a courthouse shall be fined, when the acts complained of in each case were the same.—REDDY v. COMMONWEALTH, Ky., 31 S. W. Rep. 730.

43. CRIMINAL LAW—Principal.—One who had agreed with others to commit a criminal act, who is not present at the time of its commission, cannot be considered a principal, unless he was, when the act was committed, performing some act in furtherance of the common design.—TITTLE v. STATE, Tex., 31 S. W. Rep. 677.

44. CRIMINAL LAW — Murder — Corpus Delicti.—On a murder trial, the *corpus delicti* may be proved by the testimony of an accomplice corroborated by evidence of a confession by defendant. — ANDERSON v. STATE, Tex., 31 S. W. Rep. 673.

45. CRIMINAL LAW — Misconduct of Jury—Gambling Verdict.—A new trial will not be granted because the jury, in fixing the term of imprisonment, agreed that each juror should write his verdict, on a slip of paper, and that the sum total divided by twelve should be the term, where the result thus attained was three years and ten months, and the term fixed was four years.—BARTON v. STATE, Tex., 31 S. W. Rep. 671.

46. CRIMINAL LAW—Forgery— Venue.— Under Code Cr. Proc. art. 206, providing that "the offense of forgery may be prosecuted in any county where the written instrument was forged or where the same was used or passed," one can be prosecuted in the county in which he forges an indorsement to a treasury warrant, and gets it cashed by a bank, but not in the county in which the treasury is located, and to which the bank forwards it for collection for itself.—THULMEYER v. STATE, Tex., 31 S. W. Rep. 659.

47. CRIMINAL LAW—Robbery.—Where, on the examination of witnesses, it appeared that the true name of the complaining witness was not as charged, it was proper for the State to show, before the argument began, that such person was generally called by the name in the indictment.—PENDY v. STATE, Tex., 31 S. W. Rep. 647.

48. CRIMINAL PRACTICE — Indictment. — An appeal lies by the people from an order of court, made of its own motion, sustaining a demurrer to an indictment, and directing a submission of the cause to another grand jury. Where a penal statute enumerates several distinct acts, the commission of each or any of which constitutes the crime, it is not sufficient to charge defendant with being guilty of the crime, without further charging the commission of the particular act or acts on which such crime is based.—PEOPLE v. LEE, Cal., 40 Pac. Rep. 754.

49. CRIMINAL PRACTICE — Forgery — Indictment.—While in an indictment for forgery it is unnecessary to set forth a copy or *fac simile* of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury.—STATE v. FLESHMAN, W. Va., 22 S. E. Rep. 809.

50. CRIMINAL PRACTICE — Indictment — Name—Variance.—An information for adultery charged the offense to have been committed with "Edith Cocks," while the proof showed the name to be "Edie Cox:" Held, that there was a variance as to the given names.—WATERS v. STATE, Tex., 31 S. W. Rep. 642.

51. CRIMINAL CONVERSATION—Damages.—In an action for criminal conversation, plaintiff need not show that he suffered any pecuniary damage through the loss of his wife's services, as he is entitled to recover for injuries to his feelings, his comfort, his pride, his affection, and his conjugal rights.—LONG v. BOOE, Ala., 17 South. Rep. 716.

52. CRIMINAL TRIAL — Homicide — Verdict.—The law does not fix any time for instructions. The court may fix it by rule. A court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged.—STATE v. COBBS, W. Va., 22 S. E. Rep. 810.

53. DEATH BY WRONGFUL ACT — Damages.—Where a minor is killed, leaving, him surviving, a mother, but no father, it is not necessary for her, in order to recover substantial damages for his death, to prove pecuniary loss, since she is entitled to his earnings, and therefore pecuniary loss will be presumed.—BRADLEY v. SATTLER, Ill., 41 N. E. Rep. 171.

54. DEED — Reformation — Statute of Frauds.—In the adjustment of adverse claims to land, complainant executed a deed to defendant, who was in possession of the land, and received in return a mortgage. The land was misdescribed in both the deed and the mortgage: Held, that the statute of frauds did not preclude a reformation of the instruments.—JUDSON V. MILLER, Mich., 63 N. W. Rep. 965.

55. DEED—Incompetent Person.—A deed by a person *non compos mentis*, executed before a guardian has been appointed for him, is voidable, merely; and therefore he cannot sue in ejectment to recover the land conveyed, but must first sue in equity to annul the deed.—MORAN V. MORAN, Mich., 63 N. W. Rep. 989.

56. DEPOSITIONS.—Though depositions were suppressed on account of a mistake of the clerk in the designation of the person to whom the authority ran to take the testimony, they cannot be retaken without a strict compliance with the statute as was originally required.—GIBBS V. GIBBS, Colo., 40 Pac. Rep. 781.

57. ELECTION CONTEST — Emoluments of Office.—A successful contestant for a public office is entitled to judgment for the value of the office from the time he qualified to the time of the trial of the contest.—STATE V. MCALLISTER, Tex., 31 S. W. Rep. 679.

58. EQUITY—Garnishment—Interpleader.—A creditor sued in attachment and garnished a fund in the hands of a trustee. While this suit was pending, a third person filed a bill in another court to compel the trustee to turn such fund over to him, and the trustee thereupon filed a cross-bill of interpleader: Held, that the court had no jurisdiction, either of the bill or the cross-bill, the remedy at law in the garnishment proceedings being adequate, and the court of law having first acquired jurisdiction.—NEWMAN V. COMMERCIAL NAT. BANK OF PEORIA, Ill., 41 N. E. Rep. 156.

59. EQUITY—Illegal Contract.—A court of equity will not order that notes given as collateral to a note given in consideration of a gambling debt be delivered up.—BEER V. LANDMAN, Tex., 31 S. W. Rep. 805.

60. EVIDENCE — Declarations of Vendee.—Declarations of a vendor made after a sale and delivery, and without the presence or knowledge of the vendee, are not admissible to defeat the vendee's title.—D'ARRIGO V. TEXAS PRODUCE CO., Tex., 31 S. W. Rep. 718.

61. EVIDENCE—Banks—Notice to Bank Director.—On an issue as to whether one J was liable on a note signed by S and made payable to plaintiff bank, as having held himself out as a partner of S, a statement made by a director of the bank, who had no connection with the active management of the bank, showing that he did not consider J a partner of S, is inadmissible.—KEARNEY BANK V. FROMAN, Mo., 31 S. W. Rep. 769.

62. EVIDENCE—Expert Evidence.—To justify the admission of expert evidence, the subject must be one not within common knowledge, and the witness offered must appear to be possessed of special knowledge concerning the subject.—NEW JERSEY TRACTION CO. V. BRABAN, N. J., 32 Atl. Rep. 217.

63. EVIDENCE—Res Gestæ—Negligence.—Declarations of deceased, made just before boarding a train at one of defendant's depots to go to another of defendant's depots in the same place, where he could get a ticket for W, that he was going to W, are part of the *res gestæ*, he having been killed by a train at the second depot while crossing an intervening track on his way to such depot from the train on which he had come from the other depot, and are admissible as bearing on his right to be where he was killed, that being on the customary way from the train to the ticket office.—BALTIMORE & O. R. CO. V. STATE, Md., 32 Atl. Rep. 201.

64. EVIDENCE—Statements at Former Trial.—In an action against a railroad company for injuries to a horse by its train, it was error to allow plaintiff to introduce evidence of statements of the engineer of the train, while testifying on a former trial, as to the rate at which the train was running when the accident occurred.—DENVER & R. G. R. CO. V. WATSON, Colo., 40 Pac. Rep. 778.

65. EXECUTION—Levy — Injunction.—Injunction will not issue to enjoin execution on a void judgment, which could have been reviewed by *certiorari*.—TEXAS MEXICAN RY. CO. V. WRIGHT, Tex., 31 S. W. Rep. 613.

66. EXTRADITION—Complaint before Justice.—A complaint sworn to before a justice in another State in which the charges are made on affiant's information and belief, and not on his personal knowledge, is insufficient as a basis for the order rendering the accused into custody for the purpose of extradition.—EX PARTE ROWLAND, Tex., 31 S. W. Rep. 651.

67. EXTRADITION — Procedure.—In extradition proceedings under Rev. St. U. S. § 5278, the mandate of the governor, directing the delivery of the accused to the agent of the State demanding his rendition, need not recite that the governor of the latter State either produced or caused to be produced a copy of an indictment, or an affidavit before a magistrate, showing that accused has been charged with having committed the crime.—EX PARTE MOSCATO, S. C., 22 S. E. Rep. 808.

68. FEDERAL COURTS — Jurisdiction — Federal Question.—If it appears from the plaintiff's complaint that, in any aspect which the case may assume, the right of recovery may depend upon the construction of federal statutes, and if the right of recovery, so far as it turns upon the construction of such statutes, is not merely a colorable claim, but rests on a reasonable foundation, a federal question is involved which is adequate to confer jurisdiction, although the right of recovery is also predicated on other grounds, not involving federal questions, and although the case is ultimately decided upon grounds not involving the determination of any federal question.—ST. PAUL, M. & M. RY. CO. V. ST. PAUL & N. P. R. CO., U. S. C. C. of App., 68 Fed. Rep. 2.

69. FRAUDS, STATUTE OF—Debt of Another.—An agreement between two creditors of a common debtor that each will share the loss, if any, which the other sustains on his claim against such debtor, is a "promise to answer for the debt, default or miscarriage of another person," within the statute of frauds.—SPEAR V. FARMERS' & MECHANICS' BANK, Ill., 41 N. E. Rep. 164.

70. GARNISHMENT — Exemptions.—A garnishee disclosed an indebtedness to the judgment debtor arising from loss under an insurance policy on household goods, family wearing apparel, etc., and the judgment debtor in his answer alleged that the property insured was exempt, but did not state its value, nor allege that such property was all of the like kind which was owned or used by him when the loss occurred: Held that, the answer being insufficient to show that the insured property was exempt, the money arising from the insurance was not exempt from garnishment.—WINSOR V. MCLACHLAN, Wash., 40 Pac. Rep. 727.

71. HABEAS CORPUS — Commitment for Murder.—A person committed on a charge of murder will not be discharged on *habeas corpus* where the evidence points to him, and induces a belief that he may be guilty.—EX PARTE WINTHROP, Cal., 40 Pac. Rep. 751.

72. HOMESTEAD — Rights of Widow and Surviving Children.—Under Const. art. 9, § 6, providing that on the death of one who owns a homestead the rents and profits thereof shall vest, one-half in the widow, and one-half in the surviving children, until the latter reach their majority, whereupon it shall all go to the widow, such persons hold in the manner of joint tenants, and the widow, or any one in her right, who occupies and uses the homestead, is liable to the minor children for one-half the rental value.—SPARKMAN V. ROBERTS, Ark., 31 S. W. Rep. 742.

73. INJUNCTION — Obstruction of Street.—Injunction will lie to restrain a landowner from fencing a street of a city dedicated for public use, though there is no allegation that defendant is insolvent.—ELLISON V. CITY OF LOUISVILLE, Ky., 31 S. W. Rep. 723.

74. INJUNCTION—Trespass—Remedy at Law.—Injunction will not lie to prevent a trespass on land, where the trespasser is not insolvent, since the remedy at law is adequate.—COMMISSIONERS OF HIGHWAYS OF TOWN OF ASHMORE v. GREEN, Ill., 41 N. E. Rep. 154.

75. INSURANCE — Foreign Insurance Companies.—A foreign mutual benefit society which has failed to comply with the laws of the State, and is therefore forbidden under penalty (1 How. Ann. St. § 4225), to do business in the State, cannot sue under 2 How. Ann. St. § 8136, to recover money assessed against its members in the State, and which was voluntarily paid by such members to defendant, its agent, for the use of the company, as the claim "arose out of" forbidden acts, within the statute.—PEOPLE'S MUT. BEN. SOC. v. LESTER, Mich., 63 N. W. Rep. 977.

76. INSURANCE POLICY— Issuance in Firm Name.—The fact that a policy on property formerly owned by a firm was issued in the name of such firm, after its dissolution by the death of one of the members thereof, does not invalidate the policy; the agent who procured the policy and countersigned it knowing the circumstances and no application or representation being made in order to procure the policy, which was merely a renewal of one issued to the firm.— FIRE ASS'N OF PHILADELPHIA v. LANING, Tex., 31 S. W. Rep. 681.

77. INTOXICATING LIQUOR—Local Option—Mandamus.—Under Rev. St. art. 3227, as amended by Acts 1893, p. 48, providing that the commissioners' court, upon petition of a certain number of qualified voters, shall order an election to determine whether the sale of intoxicating liquor shall be prohibited, *mandamus* will lie at the suit of such voters to compel the commissioners' court to issue the order of election, where they, without right, have refused to do so.—KIMBERLY v. MORRIS, Tex., 31 S. W. Rep. 808.

78. INTOXICATING LIQUORS — Action against Saloon Keeper.—In an action against a saloon keeper for selling liquor to plaintiff's husband, thereby injuring her means of support, and her feelings, defendant will be liable for whatever damages plaintiff has sustained from his acts, though the husband was an habitual drunkard before such sales began.—FORD v. CHEVERR, Mich., 63 N. W. Rep. 975.

79. INTOXICATING LIQUORS—Civil Damages.—Under 3 How. Ann. St. § 2283e3, making "any person or persons," and, if licensed liquor dealers, the sureties on their bonds, who have furnished liquors to a person, liable, "jointly and severally," for injuries suffered by others by such person's intoxication by said liquors, the principals and sureties on different bonds may be joined in a single action.—FRANKLIN v. FREY, Mich., 68 N. W. Rep. 970.

80. JUDGMENT— Collateral Attack—Probate Court.—When a petition for administration has been presented to a parish court in Louisiana, containing a representation of all facts necessary to confer jurisdiction to grant administration to the public administrator and decree the sale of property to pay debts, and such court, having power to inquire into the facts, and in the regular exercise of its jurisdiction, has made a decree granting administration and directing a sale, such decree cannot be questioned collaterally, either on the ground that the succession was not vacant, but had been assumed by the heirs by a tacit acceptance, or that the decedent died in another parish, or that there were no debts, or that no notice of the proceedings was given to the parties interested.—GARRETT v. BOEING, U. S. C. C. of App., 68 Fed. Rep. 51.

81. JUDGMENT LIEN — On Homestead. — A duly-recorded judgment against the owner of land exempt as a homestead attaches as a lien on the land when it loses its homestead character.—MARKS v. BELL, Tex., 31 S. W. Rep. 699.

82. LANDLORD AND TENANT — Surrender of Lease—Evidence.—When the question is whether a surrender of a lease has occurred by operation of law, the statement of the landlord that he should look to the substituted tenant for a certain item of rent, that would not be due from him as assignee, is competent evidence, and, if overruled, will constitute error in law.—DE HART v. CREVELING, N. J., 32 Atl. Rep. 212.

83. LANDLORD AND TENANT—Eviction — Damages.—Where, in an action by a tenant against his landlord for wrongful eviction from the premises, it appears that the tenant was wrongfully in possession, his lease having expired at the time of the eviction, he cannot recover damages for being kept out of possession of the property.—RANDALL v. ROSENTHAL, Tex., 31 S. W. Rep. 832.

84. LANDLORD AND TENANT—Rent—Recoupment for Damages. —In an action for rent a lessee cannot recoup damages for the lessor's injury to the premises during the occupation thereof by persons to whom the lessee sold his business, and who were to pay therefor by turning over the profits, after deducting a portion thereof, and who conducted the business in their own name.—POWERS v. DAILY, Mich., 63 N. W. Rep. 979.

85. LIFE INSURANCE—Debtor for Creditor.—A creditor agreed that if his debtor would apply for and procure the insurance of his (the debtor's) life, in an indicated insurance association, and for a designated sum, in a specified manner, he, the creditor, would from time to time pay the premium assessments necessary to keep the insurance alive, and, at the debtor's death, and the creditor's receipt of the proceeds of the insurance, would apply the same to the reimbursement of the expenditures for premiums, with interest, and then to the satisfaction of his debt with interest, and pay over to the debtor's wife whatever balance should remain of such proceeds: Held (a), that there was sufficient consideration to support the creditor's promise, and (b) that the proceeds of the insurance in the creditor's hands are there upon a trust, the performance of which the debtor's wife may enforce by suit in equity.—SELL v. SELLER, N. J., 32 Atl. Rep. 211.

86. LIMITATION OF ACTIONS—Absence from State.—Rev. St. art. 3216, providing that, if a person shall be without the limits of the State at the time a cause of action accrues against him, the action may be brought after his return, and the time of his absence shall not be counted, does not apply to a non-resident, who was temporarily within the State before taking adverse possession of land by an agent, but who was absent at the time of said taking and ever since.—WILSON v. DAGGETT, Tex., 31 S. W. Rep. 618.

87. LIMITATION OF ACTIONS.—The borrower insured the property mortgaged to secure the debt, and in the policy the clause was inserted: "Loss, if any, payable to [the creditor], as interest may appear." The policy was transferred to the possession of the creditor, and he continuously, during five years, held possession. Five years having elapsed since the maturity of the note, during which time the policy was renewed annually, with the clause in question, the note, in consequence, is not prescribed. —BEGUE v. ST. MARC, La., 17 South. Rep. 700.

87. MARRIAGE SETTLEMENT—Attempted Revocation.—One E, in anticipation of marriage, conveyed to a trustee, in the usual form of a trust deed, certain stock and bonds, with authority to the trustee to collect interest thereon, and pay the same to her during her life, "and at the death of said E the property hereby conveyed shall pass to the children of said E, if she leave any, but if she leave no children the same shall pass to her heirs at law, as though the same were real estate:" Held, that the instrument was neither a power of attorney nor a will, and was irrevocable.—CLAIBORNE v. RADFORD, Va., 22 S. E. Rep. 348.

89. MASTER AND SERVANT — Injury — Assumption of Risk.—Plaintiff alleged that he was ordered by his foreman to sit in the rear of a hand car under the brake handles; that the car was being run very rapidly; that plaintiff was ordered to rise and take hold of the brake handles while they were moving; that it was impos-

sible for him to do so without being struck by the handles; and that plaintiff did not know the danger of obeying such orders, but the foreman did. Plaintiff was struck by the moving brake handles: Held, that the facts alleged do not constitute a cause of action, as, the danger being apparent, plaintiff executed the orders at his own risk.—JONES v. GALVESTON, H. & S. A. RY. CO., Tex., 31 S. W. Rep. 706.

90. MASTER AND SERVANT — Injury — Assumption of Risk.—An experienced freight handler, who has been in the employ of a railroad for several years, a part of whose duty has been to hook up the doors of grain cars preparatory to loading them, assumes the risk of injury by falling of a door through an obvious defect therein which would cause it to fall when a heavy load was emptied into the car.—CASSADAY v. BOSTON & A. R. R., Mass., 41 N. E. Rep. 129.

91. MASTER AND SERVANT — Duty of Master — Safe Place.—In an action against a mine owner for the death of an employee through the falling of a roof of a drift in which deceased was working, it was error to charge that, if defendant failed to furnish a safe place for deceased to work in, he was guilty of negligence.—GRANT v. VARNEY, Colo., 40 Pac. Rep. 771.

92. MECHANIC'S LIEN—Waiver—Inconsistent Security.—It seems that, while the right to a mechanic's lien may be waived by the acceptance of a contract to pay for the work in securities whose existence is inconsistent with the existence of a lien, such waiver is only conditional upon the actual performance of the contract, and if it is not performed the right to the lien continues.—CENTRAL TRUST CO. v. RICHMOND, N. I. & B. R. CO., U. S. C. C. of App., 68 Fed. Rep. 90.

93. MORTGAGES — Execution under Duress.—A mortgage given to secure a debt will not be set aside as obtained by duress, on the ground that it was given to obtain a dismissal of criminal proceedings, instituted by the creditor against the mortgagor, where the mortgage was given without threats or promises having been made to the mortgagor, and after a statement by the creditor's agent that no promise could be made, but, on the contrary, the prosecution would have to take its course.—HARGREAVES v. MENKEN, Neb., 63 N. W. Rep. 951.

94. MORTGAGE FORECLOSURE — Adverse Claim.—A claim of adverse title cannot be litigated in a foreclosure suit, where the claimant was not a party to the mortgage, and claims no interest under it, notwithstanding 2 Hill's Code, § 143, providing that all persons interested in the determination of an action shall, unless otherwise provided by law, be joined; and section 150, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, they shall be brought in.—CALIFORNIA SAFE-DEPOSIT & TRUST CO. v. CHENEY ELECTRIC LIGHT, TELEPHONE & POWER CO., Wash., 40 Pac. Rep. 732.

95. MORTGAGE — Sale by Receiver — Notice.—Where, during the pendency of a receivership, the insolvent corporation's land was sold under a mortgage, free from incumbrances, pursuant to a decree of court, for the benefit of all bondholders, the fact that certain bondholders and the trustee under the mortgage had no notice of the proceedings did not affect the power of the court to make the sale.—HAMMOND v. TARVER, Tex., 31 S. W. Rep. 841.

96. MUNICIPAL CORPORATION—Railroad in Street.—An ordinance granting a railroad company the right to use a street for switch or side track purposes or depot stations is void.—STEVENSON v. MISSOURI PAC. RY. CO., Mo., 31 S. W. Rep. 793.

97. MUNICIPAL WARRANTS — Validity.—Where, on appeal in an action against a city to recover on warrants issued to plaintiff, it was adjudged that such action would not lie, because plaintiff already had the city's evidences of indebtedness, the city is precluded, in subsequent proceedings, from denying that the warrants are regular in form.—CLOUD v. LAWRENCE, Wash., 40 Pac. Rep. 741.

98. NEGOTIABLE INSTRUMENT — Notes—Insolvency of Maker—Assignor.—An assignee of a note cannot hold an assignor without suing the maker, a corporation of another State having its chief place of business and all its property therein, in such other State, though it is insolvent, and its property is in the hands of a receiver, it not appearing that he was in any way prevented from bringing suit in such State; and a suit against the president of the corporation outside such other State is insufficient.—CITIZENS' NAT. BANK v. HUBBERT, Ky., 31 S. W. Rep. 735.

99. NEGOTIABLE INSTRUMENT — Note of Corporation—Bona Fide Holder.—A private corporation cannot defend an action on its accommodation note on the ground of *ultra vires*, as against a *bona fide* holder.—FLORENCE R. R. & IMP. CO. v. CHASE NAT. BANK, Ala., 17 South. Rep. 720.

100. NEGOTIABLE INSTRUMENT — Note—Notice of Protest.—In an action on a note, against the indorsee, testimony of plaintiff that he mailed to defendant a notice of protest, at F, which place he "understood" to be the address of defendant, in the absence of any proof that F was defendant's post-office address, or any evidence as to inquiries made by plaintiff to ascertain his address, is insufficient to prove notice of protest.—GERMAN SECURITY BANK v. MCGARRY, Ala., 17 South. Rep. 704.

101. NEGOTIABLE INSTRUMENTS—Title—Pleading.—In an action on a promissory note payable to the order of a third party, a mere allegation that the plaintiff "is now the owner and holder" is not a sufficient allegation of title in the plaintiff.—TOPPING v. CLAY, Minn., 63 N. W. Rep. 1038.

102. NEGOTIABLE INSTRUMENTS — Bona Fide Purchaser.—So much of Gen. St. 1894, § 2214, as reads: "In any case, however, where the original holder of an usurious note sells the same to an innocent purchaser, the maker of such note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note,"—construed, and held, that the term "innocent purchaser" means a *bona fide* indorsee or bearer of the note, within the law merchant.—FREDIN v. RICHARDS, Minn., 63 N. W. Rep. 1031.

103. NEGOTIABLE NOTE—Payment by Surety.—Where a surety on a note pays part thereof at maturity, and then procures a stranger to take it up by giving their joint note to the holder, the intention being to keep the note alive, such transaction constitutes a purchase, and not a payment of the note; so that, in an action by the purchaser against the other surety to recover the balance due on the note, defenses which would be available against the cosurety in an action for contribution are not available against the purchaser.—CHAPPELL v. MCKEOUGH, Colo., 40 Pac. Rep. 769.

104. NEGOTIABLE NOTE—Indorser—Demand of Payment.—A holder of a note who upon transfer of the same before maturity places the address of the maker below his name on the face of the note, without the maker's knowledge, will be bound by a demand of payment by a subsequent holder at the address so given.—FARNSWORTH v. MULLEN, Mass., 41 N. E. Rep. 131.

105. OFFICIAL BONDS— Municipal Ordinance. — The sureties on a city clerk's bond, conditioned that he will pay over all money that may come to his hands by virtue of his office, are not liable for his misappropriation of money paid to him for liquor license under an ordinance requiring such money to be paid into the city treasury, since such an ordinance requires the payment to be made to the city treasurer, and not to the clerk.—ORTON v. CITY OF LINCOLN, Ill., 41 N. E. Rep. 159.

106. PLEADING—Negotiable Instruments.—An instrument in form of a bill of exchange, but naming no drawee, is, in effect, a draft by the drawer on himself, and may be sued on as an accepted bill, or as a promissory note.—FUNK v. BABBITT, Ill., 41 N. E. Rep. 166.

107. PRINCIPAL AND AGENT — Payment to Agent—Liability of Agent.—Where, in the absence of fraud, money has been voluntarily paid an agent for the use of his principal, in pursuance of a valid authority, the agent is not liable to an action in conversion at the suit of the party paying the money, although the money has never been paid over to the principal.—MATHEWS v. O'SHEA, Neb., 63 N. W. Rep. 820.

108. PRINCIPAL AND AGENT—Insurance—Liability for Agent's Default.—Where a note is given to an insurance agent by an applicant for a policy to pay the premium, with the understanding that the note will be returned if the policy is not issued, and the policy is not issued, the insurance company is liable to the maker of the note in case the latter is compelled to pay it at the suit of a *bona fide* purchaser from the agent, to whom it was made payable.— NEW YORK LIFE INS. CO. v. BAESE, Tex., 31 S. W. Rep. 824.

109. RAILROAD COMPANIES—Taxation.— Trustees in charge of a railroad whose main track is all outside the State, but whose trains are brought into the State over the tracks of another company, are "operating a railroad in this State," within the meaning of Starr & C. Ann. St. ch. 120, par. 40, requiring those "owning, operating or constructing a railroad in this State" to return schedules of its taxable property.—QUINCY, O. & K. C. RY. CO. v. PEOPLE, Ill., 41 N. E. Rep. 162.

110. RAILROAD MORTGAGES — After-Acquired Property.—The S Ry. Co. made a mortgage covering after-acquired property, which was recorded in W county, Iowa, on January 31, 1890. On January 21, 1890, the railway company took a lease of certain lands for depot purposes within W county. Most of the rolling stock acquired by the railway company was shown to have been delivered to it before being used on such depot grounds, and none was shown to have been used there before delivery to the railway company: Held that, as to all rolling stock acquired after the recording of the mortgage, the lien of the mortgage attached immediately upon its delivery to the company in W county, or upon its coming within that county, and before any lien could attach in favor of the landlord under the Iowa statute (McClain's Code, § 3192), giving a landlord a lien for rent on any personal property of the tenant used on the premises, during the term.—MANHATTAN TRUST CO. v. SIOUX CITY & N. RY. CO. TRUST CO. OF NORTH AMERICA, U. C. C. (Iowa), 68 Fed. Rep. 72.

111. RECEIVER—Preferences.—The chancellor has no authority to direct the receiver of a manufacturing corporation to prefer claims for material and labor furnished the company, because such labor and material entered into the permanent improvement of the company's property.—MERCHANTS' BANK OF ATLANTA v. MOORE, Ala., 17 South. Rep. 705.

112. SALE OF GOODS—Implied Warranty.— Where an article is sold by a written contract which is silent on the subject of warranty, no express or oral warranty, made at the same time or previously, can be shown, nor can an oral warranty be added to one that is written.—J. I. CASE PLOW WORKS v. NILES & SCOTT CO., Wis., 63 N. W. Rep. 1013.

113. SALE—Tender of Delivery.—The shipment by a vendor at A of goods consigned to himself at B, the vendor making a draft for the price, and attaching the bill of lading thereto, is a tender of delivery at the point to which the goods are shipped, and not at the place of shipment.—VAN VALKENBURG v. GREGG, Neb., 63 N. W. 949.

114. STARE DECISIS— Constitutional Law.— The doctrine of *stare decisis* does not require that prior decisions subjecting the homestead to forced sale for the satisfaction of a local assessment, in contravention of the constitution, should be followed.— HIGGINS v. BORDAGES, Tex., 31 S. W. Rep. 803.

115. TRESPASS TO TRY TITLE — Railroad Company.— Where a railroad company, in possession of a right of way under a parol license, abandons the same, but subsequently re enters, one who has purchased the land in the meanwhile, without notice of the license, may maintain trespass to try title.—ST. LOUIS, S. W. RY. CO. v. HARGROVE, Tex., 31 S. W. Rep. 696.

116. TRIAL — Amending Pleadings.—Where, in an action against a railroad company for personal injury, after plaintiff's evidence was in, defendant introduced written evidence which showed that at the time of the accident the property and franchise of defendant was owned by another company, the refusal to allow plaintiff to amend the writ and declaration so as to show that the two companies were the same was error, as Code 1887, § 3384, authorizes the court to allow amendments, where there is a variance between the allegations and the proof, in order to promote justice. —LANGHORNE v. RICHMOND CITY RY. CO., Va., 22 S. E. Rep. 357.

117. TRUSTS—Combinations in Restraint of Trade.—A trust combination organized in order to obtain control of the manufacture and sale of distillery products, by purchasing the stock of various distillery companies, and placing it in the hands of trustees, is illegal, as creating a monopoly.—DISTILLING & CATTLE FEEDING CO. v. PEOPLE, Ill., 41 N. E. Rep. 188.

118. VENDOR AND VENDEE — Mortgage on Land—Liability of Personal Estate.—One who buys land on which is a mortgage does not, by assuming payment of it, or thereafter guarantying payment of the mortgage note to the person to whom the mortgagee transfers it, make the debt his own in such wise that on his death his heirs can have it paid out of his personal estate.—IN RE HUNT, R. I., 32 Atl. Rep. 204.

119. VENDOR AND VENDEE — Title to Land—Estoppel. —Where land is conveyed by instrument which provides that if the balance of the price is paid when due it shall be a deed absolute, otherwise to stand as a bond for title, and the maker of the instrument conveys the land to a third person, on his paying the balance of the price, at the direction of the holder of the instrument, neither the latter nor any one claiming under him with notice can dispute the title of such third person.—MOORE v. TARRANT COUNTY AGRICULTURAL, MECHANICAL & BLOODED STOCK ASS'N, Tex., 31 S. W. Rep. 709.

120. VENDOR AND VENDEE — Sale of Land to Minor—Rescission.—Where a conveyance of real estate to a minor is sought to be avoided by the vendee on reaching his majority, upon a tender to the vendor of a reconveyance, a lien on the land to secure a return of the purchase money will be implied.—MORRIS v. HOLLAND, Tex., 31 S. W. Rep. 690.

121. WILL—Devise for Charitable Uses.—Const. §§ 269, 270, making devises of land or money, to be raised by sale thereof, to persons or bodies politic for charitable uses, void, and forbidding bequests of personal property in general to be made in favor of religious corporations, applies to dispositions in a will made before the adoption of the constitution, where testator died subsequent to such adoption.—BLACKBOURN v. TUCKER, Miss., 17 South. Rep. 737.

122. WILL—Signature by Mark.—Evidence that a person presented an instrument to others for attestation as his will is sufficient to justify a finding that a mark appended thereto, and stated therein to be his mark, was adopted by him as his signature.—STEPHENS v. STEPHENS, Mo., 31 S. W. Rep. 792.

123. WILLS—Nature of Estate.—A devise of an estate to a woman and her heirs, and, in case of her death without issue, to another and her heirs, creates a contingent estate, which does not presently vest in the remainder man.—WRIGHT v. BROWN, N. Car., 22 S. E. Rep 313.

124. WITNESS—Reputation.—It is error to charge that one testifying that he had never heard the reputation of a witness for truth and veracity questioned at all is not entitled to the same consideration as one who testifies that he has heard it questioned and discussed among the neighbors of such witnesses.—CONKEY v. CARPENTER, Mich., 63 N. W. Rep. 990.